

# DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Office of the Secretary

### 45 CFR Part 96

#### Block Grant Programs

**AGENCY:** Administration for Children and Families, HHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the regulations of the Department of Health and Human Services (HHS) governing the administration of block grant programs; it applies specifically to the low-income home energy assistance program (LIHEAP). The rule revises, and makes final, provisions included in an interim final rule that amended the block grant regulations and implemented certain changes to the LIHEAP statute made by the Augustus F. Hawkins Human Services Reauthorization Act of 1990. These changes involve the Department's response to complaints, reduction in the percent of LIHEAP funds that grantees may carry forward from one fiscal year to the next, waiver authority to increase the percent of LIHEAP funds that grantees may use for weatherization, a requirement for additional outreach and intake services under certain circumstances, and a leveraging incentive program. This final rule also makes several related, largely technical and conforming, amendments to the block grant regulations.

**EFFECTIVE DATE:** This final rule is effective beginning May 31, 1995, with the exception of section 96.87, Leveraging incentive program, which is effective beginning October 1, 1995. Section 96.87 as included in the interim final rule published in the **Federal Register** on January 16, 1992 (57 FR 1960), is effective through September 30, 1995.

**FOR FURTHER INFORMATION CONTACT:** Janet M. Fox, 202-401-9351, or Ann Bowker, 202-401-5308.

**SUPPLEMENTARY INFORMATION:** The Low-Income Home Energy Assistance Act of 1981, title XXVI of the Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35), established the low-income home energy assistance program. On July 6, 1982, HHS issued final regulations for LIHEAP and the six other blocks grants it administered at that time (45 FR 29472). Since then, the statute and the block grant regulations have been amended several times.

The Augustus F. Hawkins Human Services Reauthorization Act of 1990 (Pub. L. 101-501) was enacted on

November 3, 1990. Title VII of Public Law 101-501 contains amendments to the Low-Income Home Energy Assistance Act, including several changes effective in FY 1991 and FY 1992. These changes concern HHS's response to formal complaints, reduction in the maximum amount that grantees may carry forward from one fiscal year to the next, waiver authority to increase the statutory weatherization assistance maximum, a requirement for additional outreach and intake services in certain cases, and a leveraging incentive program.

On January 16, 1992, HHS published an interim final rule (57 FR 1960) amending the block grant regulations and implementing these statutory changes, as required under Public Law 101-501. The interim final rule allowed a 60-day comment period.

We received 25 letters commenting on the interim final rule—two from members of Congress, twelve from State LIHEAP grantees, one from a county, two from Indian tribal grantees, three from home energy suppliers, and five from others. Based on the comments we received and on our experience over the two and half years the interim rule has been in effect, we have revised the interim rule as appropriate. It is now being made final.

In addition to the statutory changes implemented by the interim final rule published January 16, 1992, Public Law 101-501 includes several changes scheduled to affect LIHEAP beginning in FY 1994. These changes concern forward funding based on a program year of July 1 through June 30—whose implementation, initially set for FY 1993, was delayed until FY 1994 by the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1993 (Public Law 102-394)—and the end of authority to transfer LIHEAP funds to other HHS block grants. The Department published a notice of proposed rule making (NPRM) regarding these changes, and other proposed changes involving both LIHEAP and other HHS block grants, on November 16, 1993 (58 FR 60498). The NPRM allowed a 45-day comment period. Since then, the Human Services Amendments of 1994 (Public Law 103-252), enacted May 18, 1994, changed the forward (or advance) funding program year to October 1 through September 30—the same dates as the current Federal fiscal year, but funded one year in advance. The November 16, 1993, proposed rule also included some provisions that had originally been included in a notice of proposed rulemaking issued by the Department on

July 17, 1992. Based on comments received on these notices of proposed rulemaking, HHS intends to publish a separate final rule implementing appropriate provisions, except for the provisions described below, which are incorporated into the final rule published today.

The final rule published today includes several changes proposed in the November 1993 NPRM. They involve issues that were also addressed in the January 1992 interim rule. One change gives grantees the option to submit a preliminary request for a waiver to increase the statutory weatherization maximum. Other changes relate to the end of grantees' authority to transfer LIHEAP funds to other block grants after FY 1993, and reduction in the amount grantees may carry forward from one fiscal year to the next, and are included in the regulations' discussion of the time period for obligation of LIHEAP funds. These technical amendments implement provisions of Public Law 101-501. We received one comment from a State LIHEAP grantee on the weatherization waiver in the NPRM, and none on the end of transfer authority or reduction in maximum carryover.

The final rule also makes a technical amendment deleting reference to the transfer authority in the regulations' discussion of uses of leveraging incentive funds, because this authority has ended.

Finally, the final rule makes a technical amendment changing the due date of grantees' reports on their leveraging activities, in accordance with the Human Services Amendments of 1994 (Pub. L. 103-252). Title III of Public Law 103-252 contains amendments to the Low-Income Home Energy Assistance Act. We plan to address most of these statutory amendments in a proposed rule at a later date.

The provisions of the regulations, together with the comments we received and our responses, are discussed below.

## Section-by-Section Analysis of Changes in the Regulations

### Subpart B—General Procedures

#### Section 96.14 Time Period for Obligation and Expenditure of Grant Funds

Public Law 101-501 amended section 2607(b)(2) of the LIHEAP statute, reducing the maximum amount of LIHEAP funds that grantees may carry forward for obligation in the succeeding fiscal year, from 15 to 10 percent of the funds payable to the grantee and not transferred to another HHS block grant.

This change was effective beginning with FY 1991 funds carried forward to FY 1992. In addition, Public Law 101-501 amended section 2604(f)(2) of the statute, ending grantees' authority to transfer LIHEAP funds to other HHS block grants, beginning in FY 1994.

The final rule makes technical and conforming corrections to section 96.14(a)(2) of the block grant regulations, which concerns obligation and carryover of LIHEAP funds, to reflect these statutory changes. Consistent with a change to section 96.81 that was included in the interim rule, the final rule specifies the current reduced amount that grantees may carry forward to the next fiscal year. Also, it omits reference to transfer of LIHEAP funds, beginning with FY 1994 allotments.

Also, the final rule clarifies that section 96.14(a)(2) applies to regular LIHEAP block grant funds and not to LIHEAP leveraging incentive funds. (Section 96.87 of the regulations deals with leveraging incentive funds.)

These technical changes are consistent with language in the notice of proposed rulemaking published November 16, 1993, except that the final rule deletes references to funding on a program year cycle, since Congress determined in the Human Services Amendments of 1994 that LIHEAP will remain on a Federal fiscal year cycle. We received no comments on these changes in the NPRM.

### Subpart E—Enforcement

#### Section 96.50 Complaints

Public Law 101-501 amended section 2608(a)(2) of the LIHEAP statute, effective beginning in FY 1991. Section 2608(a)(2) concerns formal complaints of a substantial or serious nature that a grantee has failed to use funds in accordance with the LIHEAP statute. The previous statutory language had required HHS to "respond in an expeditious and speedy manner to" such complaints. The amended language sets a specific time period within which HHS must respond to complaints; it requires HHS to "respond in writing in no more than 60 days to matters raised in" complaints.

As originally published in July 1982, the block grant regulations stated at 45 CFR 96.50(d):

The Department will provide a written response to complaints [concerning grantee administration of the block grants] within 180 days after receipt. If a final resolution cannot be provided at that time, the response will state the reasons why additional time is necessary.

Section 96.50(c) of the regulations provides that HHS will "promptly furnish a copy of any complaint" to the grantee against which the complaint was made and that, in responding to the complaint, HHS will consider any comments received from the grantee within 60 days, or a longer period agreed on by the grantee and HHS.

The preamble to the interim final rule published in January 1992 explained that our experience has shown that, because of the serious and generally complex nature of the formal complaints we have received, LIHEAP grantees usually require a full 60 days to respond to complaints made against them. The interim rule therefore amended section 96.50(d) by adding a new sentence stating that, within 60 days after HHS receives a complaint concerning the low-income home energy assistance program, it "will provide a written response to the complainant, stating the actions that it has taken to date and the timetable for final resolution of the complaint."

This amendment implemented the requirement in Public Law 101-501, that HHS respond within 60 days to complaints, while acknowledging the amount of time generally needed for grantees to respond to complaints, and for HHS to review and resolve these complaints. The interim rule's preamble explained that HHS will continue to provide final resolution as soon as possible, consistent with our responsibility to provide the affected grantee sufficient opportunity to respond and to provide thorough Federal review, and that we will continue to advise the complainant of the final action taken.

#### Public Comments, HHS Responses, and Change

We received three comments on this amendment. Two commenters said that they believed the revised schedule for HHS response to complaints was reasonable and adequate.

The third commenter said that, while HHS changed the regulation "to provide a written response to complaints under the LIHEAP statute within 60 days, rather than the previous 180 days, the response envisioned by HHS' language appears to be no more than a status report." The commenter also said that Public Law 101-501 requires HHS to "establish a procedure for reviewing and investigating any complaint regarding State program compliance with Federal statutes and regulations. . . ." The commenter asserted that "HHS does not establish 'a procedure for reviewing and investigating any complaint regarding

State program compliance' " and noted that 45 CFR 96.50(c), "relating generally to block grants, states that HHS will conduct an investigation of complaints [only] 'where appropriate.'" The commenter believed that "this regulatory language is contrary to the statute" and must be amended "to establish for LIHEAP the procedure called for by this statutory change."

However, the language cited by the commenter is not the language of Public Law 101-501. Further, the block grant regulations provide a procedure under paragraphs (c), (d), and (e) of 45 CFR 96.50, for reviewing the resolving complaints, and the January 1992 interim rule modified that procedure to implement the requirement in Public Law 101-501 for a written response within 60 days to complaints involving LIHEAP.

Where section 96.50(c) states that HHS "will conduct an investigation of complaints where appropriate," "investigation" means a formal and systematic, thorough and detailed effort to learn facts, that is carried out after a review conducted in response to a complaint shows evidence of possible illegal action, such as commission of fraud or theft. An investigation typically would result in a recommendation for civil or criminal prosecution and/or administrative sanctions. (This is consistent with the use of the term by the HHS Office of Inspector General.) In most cases, complaints are resolved without conducting a formal investigation. We will conduct an investigation if our review of a complaint indicates a need to do so.

The same commenter also referred to Senate Report 101-421 accompanying H.R. 4151 (the predecessor to Public Law 101-501), that "explains this proposed change as 'designed to respond to concerns regarding the need for a more expeditious and effective response to complaints. . . .'"

Since the start of the LIHEAP block grant in FY 1982, we have tried to respond expeditiously and effectively to the formal complaints we have received. In addition, we have worked to reach expeditious and effective resolution of other concerns expressed to us about grantee LIHEAP programs. During this time, the only comments we have received on the timeliness and effectiveness of our response to complaints have been the cited sentence in the Senate Report and the comments of this commenter. Neither included any specific examples.

In response to this commenter, the final rule adds the phrase, "if the complaint has not yet been fully resolved," to the last sentence under

section 96.50(d), to indicate that we will fully resolve complaints within 60 days whenever possible. That sentence now reads,

Under the low-income home energy assistance program, within 60 days after receipt of complaints, the Department will provide a written response to the complainant, stating the actions that it has taken to date and, if the complaint has not yet been fully resolved, the timetable for final resolution of the complaint.

We will make every reasonable effort—while providing sufficient time for grantees to respond to complaints and for HHS to review the complainant's allegations and the grantee's response and to conduct an investigation as necessary—to fully resolve complaints within 60 days from the date we receive them. However, based on our experience over the past decade, we believe that it would not serve the best interests of the complainant, the grantee, or the Department to require by regulation that HHS provide final resolution of formal complaints within 60 days of their receipt.

#### **Subpart H—Low-Income Home Energy Assistance Program**

##### *Section 96.83 Increase in Maximum Amount That May Be Sued for Weatherization And Other Energy-Related Home Repair*

Public Law 101–501 amended section 2605(k) of the LIHEAP statute, beginning in FY 1991. It provides that grantees may request after March 31 of each fiscal year that HHS grant a waiver for the fiscal year that increases from 15 percent to up to 25 percent of the LIHEAP funds allotted or available to the grantee, the maximum amount of LIHEAP funds the grantee may use for low-cost residential weatherization or other energy-related home repair. Grantees that choose to apply for a waiver may request authority to use for these purposes any amount between 15 percent and 25 percent of their LIHEAP funds.

The statute provides that, after reviewing a grantee's waiver request and any public comments, HHS may grant a waiver if it determines that: (1) the number of households in the grantee's service population that will receive LIHEAP heating assistance, cooling assistance, and crisis assistance (energy crisis intervention) benefits during the fiscal year will not be fewer than the number that received such benefits in the preceding fiscal year; (2) the aggregate amount of LIHEAP benefits that will be received during the fiscal

year will not be less than the aggregate amount received in the preceding fiscal year; and (3) the weatherization activities have been demonstrated to produce measurable savings in energy expenditures. The statute also provides that HHS may grant a waiver if, in accordance with regulations to be published by HHS, the grantee's waiver request demonstrates good cause for failing to satisfy the requirements in the preceding sentence.

The January 1992 interim final rule added a new section 96.83 to the block grant regulations to implement procedures concerning "standard" and "good cause" waivers of the 15 percent weatherization maximum.

The November 1993 NPRM on forward funding proposed that grantees be allowed to submit preliminary weatherization waiver requests after January 31 of the program year, to expedite review and provide more time for obligation of funds.

#### **Public Comments, HHS Responses, and Changes**

We received several comments on the provisions in the LIHEAP statute, the interim rule, and the November 1993 NPRM relating to waiver of the weatherization maximum.

Two commenters supported the statutory waiver provision allowing an increase in the percent of LIHEAP funds that can be used for weatherization. One commenter opposed the statutory waiver provision, stating that it makes LIHEAP "cash" heating/cooling/energy crisis assistance and LIHEAP weatherization "continue to compete for limited resources." One commenter said that the rule "reflects our understanding" of the statutory weatherization amendments.

#### **Comment and Response**

Another commenter believed that HHS "should have been more explicit in conveying" to grantees that Congress intended that weatherization waivers be granted only "under the most limited of circumstances." A different commenter said that the guidance in the interim rule failed to state Congress' intent, per the Senate report, that a "good cause" waiver be granted only when a grantee has demonstrated "compelling reasons."

While we did not specifically state that waivers—especially "good cause" waivers—would be granted only for compelling reasons and under very limited circumstances, we believe it is clear that grantees must demonstrate that they meet specific, stringent requirements in order to receive a waiver. To date, we have received only eight weatherization waiver requests.

We approved the one request received in FY 1991 and seven requests received in FY 1994. We approved standard waivers for four of the FY 1994 requests.

#### **Comment and Response**

A commenter erroneously stated that the interim rule "merely requests that the Grantee submit an explanation of the specific criteria under which the Grantee's weatherization activities have been shown to produce measurable savings" in energy expenditures. The commenter believed that these savings must be "substantial and long term." The commenter proposed that HHS establish "a standard methodology \* \* \* in the regulations for normalizing annual consumption to ensure a common measure for energy savings" and set "a minimum threshold" for "measurable savings."

The interim rule—and this final rule—require at section 96.83(c)(5) that grantees include with their weatherization waiver requests "an explanation of the specific criteria under which the grantee has determined whether" all LIHEAP weatherization activities to be carried out during the fiscal year for which the waiver is requested "have been shown to produce measurable savings in energy expenditures." However, we decline to require that savings be "substantial and long term," to establish a standard methodology to measure energy savings, or to set a minimum threshold for savings. The LIHEAP statute's third criterion for a "standard" waiver specifies that the grantee's "weatherization activities have been demonstrated to produce measurable savings in energy expenditures by low-income households." The regulation uses parallel language; it does not go beyond the substance of the statutory criterion to specify a required level or duration, or a standard measure, of energy savings. We believe that it would be inconsistent with the block grant philosophy expressed by Congress and implemented by HHS to impose such additional requirements. The basic premise of the block grants is that, within the parameters set by the statute, grantees should have maximum flexibility to target resources to meet the needs of their citizens. The regulation limits the circumstances under which waivers will be granted, in accordance with the statutory language and what we understand to be the legislative intent as expressed in the legislative history.

#### **Comment and Response**

Another commenter addressed the third criterion that must be met by grantees applying for a "standard"

waiver—that the weatherization activities to be carried out by the grantee in the fiscal year for which the waiver is requested have been shown to produce measurable savings in energy expenditures. The commenter erroneously believed that the criterion applies only to “weatherization” and “ignores [other] low-cost energy related repair.” However, paragraph (a) of section 96.83, which describes the scope of the section, states that “low-cost residential weatherization and other energy-related home repair” is referred to (more briefly) as “weatherization.”

#### *Comment and Response*

A commenter proposed that improvement in health and safety resulting from weatherization be considered acceptable to meet the third criterion. We cannot adopt this proposal, because it would violate the LIHEAP statute’s requirements for this criterion—that the “weatherization activities have been demonstrated to produce measurable savings in energy expenditures by low-income households.” However, the statute and regulations provide for a waiver if a grantee can demonstrate “good cause” for failing to meet one or more of the three “standard” waiver criteria.

#### *Comment and Response*

The interim rule’s preamble indicated that, when determining whether to grant a “good cause” waiver, HHS would consider arguments and documentation that greater benefits will accrue to recipients for use of LIHEAP funds for weatherization than for cash assistance. A commenter asserted that neither the statute nor the legislative history supports considering this argument. However, the commenter mentions the Senate report’s reference to long-term benefits resulting from weatherization improvements that reduce home energy costs. Consistent with the Senate report’s prominent discussion of the expanded flexibility grantees have to provide energy conservation improvements through the weatherization waiver and the reductions in home energy costs resulting from these improvements, and with the statute’s designation of HHS to determine rules for “good cause” waivers, we are not changing this policy.

#### *Comment and Response*

The commenter also believed that if the grantee operated a shorter program, reduced outreach activities, and/or “took other administrative steps which may also have led to a reduction in applications,” this would be relevant in

considering whether to grant a “good cause” waiver. We agree. We therefore revised section 96.83(e) to provide that a grantee requesting a “good cause” waiver must include with its request a comparison of its opening and closing dates for applications, and a description of its outreach efforts, for heating, cooling and crisis assistance, in the fiscal year for which the waiver is requested and in the preceding fiscal year. The comparison should address the actual dates and outreach efforts—or the planned dates and planned outreach for future efforts expected to take place later in the fiscal year for which the waiver is requested. If the grantee’s application period was longer and/or its outreach efforts were greater in the preceding fiscal year for one or more of these program components, the grantee must include an explanation demonstrating good cause why a waiver should be granted in spite of this fact. We also revised this section to provide that if the grantee took, or will take, other actions that led, or will lead, to a reduction in the number of applications for heating, cooling, and/or crisis assistance in the fiscal year for which the waiver is requested, the grantee must include with its request a description of these actions, and an explanation demonstrating good cause why a waiver should be granted in spite of these actions.

In addition, we made minor clarifying technical amendments to section 96.83(e) describing information that must be included in grantees’ requests for “good cause” waivers under a newly designated paragraph (1), and explaining the conditions under which HHS will grant a “good cause” waiver under a newly-designated paragraph (2).

#### *Comment and Response*

A commenter believed that data from local home energy vendors are most appropriate for documenting decreased home energy costs, because Department of Energy data are mostly national or regional. We agree. While we are not changing the regulation to require use of data from local vendors, we encourage grantees submitting waiver requests that document decreased home energy costs to use actual cost/price/expenditure data from the State or local area. In most cases, compiling the best available data probably would involve at least a sample of vendors in the grantee’s service area.

#### *Comment and Response*

A commenter said that HHS should require grantees submitting waiver requests to include copies of public statements in full, including transcripts

of comments made during public hearings, because the interim rule’s requirement that grantees submit “copies and/or summaries of public comments” affords grantees “an opportunity to selectively quote and characterize concerns expressed” by the public. The commenter quoted the Senate report statement that HHS “should not necessarily be guided only by the submissions from the state” in deciding whether to grant a waiver, to support the assertion that the legislative history “clearly” intends HHS “to independently consider these comments.”

We decline to require grantees seeking waivers to submit “copies of public statements in full, including transcripts of comments made during public hearings.” We believe that the paperwork burden imposed would outweigh the possible advantages of such a requirement. Use of the words “not necessarily” in the Senate report indicates that HHS may decide the extent to which it will review public comments. We believe that grantees will make responsible decisions regarding submission of relatively brief public comments in full and submission of summaries of lengthy and/or numerous comments. We will independently consider the comments and summaries submitted to us. During compliance reviews, we will monitor the records/documentation of grantees that submitted summaries of public comments with waiver requests, to assure that these summaries accurately reflect the comments.

In response to this commenter’s recommendations, however, we changed section 96.83(b) of the regulations to require that written public comments on a proposed waiver request be made available for public inspection upon their receipt by grantees, and that any summaries of written comments, and transcripts and/or summaries of any verbal comments made on the request at public meetings or hearings also be made available for public inspection. We also changed this section to specify that transcripts and/or summaries of any comments made on the request at public meetings or hearings must be included with waiver requests submitted to HHS. Finally, we changed this section to require that copies of actual waiver requests must be made available for public inspection upon submission of the requests to HHS, enabling the public to review the decisions made by the grantee and verify that comments were accurately conveyed. These additional requirements strengthen grantees’ accountability to the public by assuring

public access and the opportunity to respond to comments, and by assuring that waiver requests submitted to HHS include verbal as well as written public input.

The final rule also changes section 96.83(b) to require grantees to make all weatherization waiver requests—including the preliminary waiver requests described below—available for public inspection and comment until at least March 15 of the fiscal year for which the waiver is requested. Several grantees said in their FY 1994 LIHEAP plans that they intended to request weatherization waivers in FY 1994. Public participation in the development of the plan—before or early in the fiscal year—took place before the severity of the winter, winter fuel prices, etc., were known. Therefore, public inspection and comment this far in advance of submission of a waiver request is not sufficient; public participation would not be meaningful if the only public notification was before the winter. There should be public notice about a proposed request, after January 1 of the fiscal year for which the waiver is to be requested.

We have tried to balance the interests of the public—the recipients of LIHEAP assistance—and the valid concerns of grantees—the primary administrators of the LIHEAP block grant. We have also tried to write regulations that are consistent with the statute and legislative history, that require grantees to address specific criteria and provide specific information (including quantified data) to justify use of additional funds for weatherization—without imposing unnecessary and burdensome paperwork requirements and without making it virtually impossible to receive a waiver. We are committed to assuring program accountability and fair treatment, meaningful access to information, and meaningful opportunity for input for the public. However, it would be inconsistent with the block grant philosophy clearly expressed by Congress and implemented by HHS to burden grantees with regulatory requirements that do not clearly serve those ends and that are not based on statutory requirements and/or legislative history.

#### *Comments and Response*

Finally, the interim rule's preamble said that we were interested in comments about whether the statutory starting date of April 1 for weatherization waiver requests would create problems for administration of grantee programs under forward funding. The forward funding program

year was scheduled to begin July 1 and end June 30, leaving only three months for submission and review of waiver requests and for obligation of most of the funds for which a waiver has been granted. We received two comments in response. A State proposed that HHS ask Congress to amend the LIHEAP statute to allow submission of waiver requests after January 31 if forward funding is implemented. Another commenter said that a submission date two to four weeks before March 31 might be reasonable.

Our November 1993 NPRM on forward funding proposed that grantees be permitted to submit a preliminary waiver request after January 31 of a program year. This would provide sufficient time for HHS to review the waiver request and obtain any additional information that might be needed, and still allow the grantee to obligate its funds by June 30, which was scheduled to be the end of the forward funding program year. In a comment on the NPRM, a State proposed that weatherization waiver requests be submitted with the grantee's initial LIHEAP application for a program year, and that States not be required to submit new waiver requests each time they wanted a waiver. The commenter objected to the (statutory) requirement that HHS make decisions on waiver requests only after March 31.

Seeking earlier feedback on their FY 1994 waiver requests, this State and another submitted these requests before April 1, 1994. These grantees confirmed and completed the requests, and HHS made the decisions to approve them, after March 31.

The LIHEAP statute specifies that HHS may grant a waiver "for a fiscal year" if the grantee submits a written request to the Department "after March 31 of such fiscal year" and if HHS "determines, after reviewing such request and any public comments," that the number of households that will receive LIHEAP benefits other than weatherization, and the aggregate amount of these benefits, will be greater in the fiscal year for which it requests a waiver than they were in the preceding fiscal year, or there is good cause for not meeting these conditions. The grantee cannot know until well into each winter how many households it will (or is likely) to serve and the amount of benefits it will provide, since this often depends on weather and economic conditions that are not known before the winter.

However, the written comment on the NPRM, grantees' submission of early weatherization waiver requests and statements of intent to apply for

waivers, and verbal comments indicated grantees' concern that April 1 is relatively late in the program year—and in the Federal fiscal year as well. It would be mid-April, at the earliest, before a decision was made. This would leave considerably less than three months for additional weatherization funds to be obligated under the proposed July 1 to June 30 program year. It would leave considerably less than six months under the Federal fiscal year.

As noted earlier, Congress has determined that LIHEAP will remain on the Federal fiscal year funding cycle, so there will be more time for weatherization to be implemented. But we have concluded that the option for a grantee that wants a weatherization waiver, to submit a preliminary waiver request between February 1 and March 31, is appropriate for the fiscal year cycle as well as the program year cycle. It will enable HHS to review the preliminary request and discuss any issues or concerns with the grantee as winter is ending. Once the grantee submits updated information and a confirmation of its request after March 31, HHS can more quickly decide and respond, and the grantee will have more time to carry out the weatherization.

This final rule therefore changes section 96.83(c) of the regulations to permit grantees to submit preliminary waiver requests at their option, between February 1 and March 31 of the fiscal year for which the grantee seeks a waiver. The preliminary request should contain the same information required for waiver requests submitted after March 31. Because the LIHEAP statute permits grantees to submit waiver requests for a fiscal year "after March 31 of such fiscal year," grantees that submit preliminary requests must submit formal confirmation of their request after March 31, along with information on any additional public comments received and any changes to the request. HHS will make the decisions on whether to grant waivers after March 31.

#### *Additional Information*

The preamble to the January 1992 interim final rule included additional information relating to "standard" and "good cause" waivers, public comment, submission and review of waiver requests, and the effective period for waivers. With indicated modifications and clarifications made in response to comments and our experience with weatherization waiver requests, that information is still effective and is included as the remainder of this final rule's preamble discussion of section 96.83, as follows.

*"Standard" and "Good Cause" Waivers*

The first criterion for a "standard" waiver requires that the number of households in the grantee's service population that will receive LIHEAP heating, cooling, and crisis assistance benefits will not be fewer than the number that received such benefits in the preceding fiscal year. This criterion applies to the total, combined, aggregate number of households receiving these types of benefits in each fiscal year. Grantees are to use their best estimates for each fiscal year of (1) the total or combined number of all households receiving each of these types of assistance (which may involve some duplication, e.g., counting a household twice if it received both regular heating assistance and heating crisis assistance); or (2) the unduplicated number of households receiving heating assistance and heating crisis assistance plus the unduplicated number of households receiving cooling assistance and cooling crisis assistance. Grantees must use the same method of calculation for both fiscal years. Numbers for the earlier fiscal year should be consistent with the numbers included in the grantee's official report of the number and income levels of households it assisted during that year (as required by 45 CFR 96.82) or with a revised report.

The second criterion requires that the aggregate amount of LIHEAP benefits in the current year will not be less than the aggregate amount of LIHEAP benefits received in the preceding fiscal year. It applies to the total, combined, aggregate amount, in dollars, of LIHEAP heating, cooling, and crisis assistance benefits in each fiscal year—not to the separate totals for each type of assistance. This final rule clarifies at section 96.83(c)(2)(ii) that the LIHEAP benefit amounts must be expressed in dollars. When items such as blankets and fans are provided as benefits, the dollar amount of LIHEAP funds used to purchase them should be included. When services such as emergency repair of furnaces are provided, the dollar amount of LIHEAP funds used to pay for the services should be included.

Grantees will need to project figures for any households to be served and funds to be obligated from the date the waiver request is submitted until the end of the fiscal year for which the waiver is requested.

This final rule clarifies that the first and second criteria apply respectively to the number of households receiving LIHEAP heating, cooling, and crisis assistance, and to the amount of LIHEAP heating, cooling, and crisis assistance, provided by the grantee's

Federal LIHEAP allotment from regular and supplemental appropriations. It clarifies that assistance provided from other sources, such as the grantee's own funds, oil overcharge funds, (other) leveraged resources, and leveraging incentive funds, should not be included under these criteria.

The third criterion requires that the weatherization activities have been shown to produce measurable savings in energy expenditures. It applies to all LIHEAP weatherization activities to be carried out by the grantee during the fiscal year for which the waiver is requested, not just to activities proposed to be carried out with amounts above 15 percent of the grantee's LIHEAP funds. Grantees will not meet this criterion unless all of their LIHEAP weatherization activities for the fiscal year have been shown to produce measurable savings.

The LIHEAP statute and the HHS block grant regulations do not name specific activities which are allowable as weatherization and other energy-related home repair under the LIHEAP program. However, the statute and Federal regulations for the low-income weatherization assistance program (LIWAP) administered by the Department of Energy (DOE) do name certain weatherization measures that are allowable under that program. The statute authorizing LIWAP is the Energy Conservation in Existing Buildings Act of 1976 (title IV of the Energy Conservation and Production Act, Public Law 94-385, as amended; 42 U.S.C. 6851 et seq.). The Federal regulations implementing DOE's Weatherization Assistance for Low-Income Persons are found at 10 CFR part 440. These regulations include "Standards for Weatherization Materials" at Appendix A. In addition, DOE has allowed other activities by program notice and correspondence.

The DOE weatherization statute and regulations apply specifically to LIWAP, and the LIHEAP statute and regulations apply to LIHEAP. However, to promote consistency in their weatherization programs, LIHEAP grantees may choose to use certain DOE weatherization provisions as guidance in administering their LIHEAP weatherization programs, as long as these provisions are consistent with the LIHEAP statute and regulations.

(Public Law 103-252—the Human Services Amendments of 1994—allows HHS to permit LIHEAP grantees to use LIHEAP weatherization funds under DOE LIWAP rules that are not consistent with the LIHEAP statute. HHS plans to address this new option

in a proposed rule on Public Law 103-252.)

HHS will accept the following as weatherization activities which have been shown to produce measurable savings in energy expenditures, as long as these activities also are consistent with the requirements of the LIHEAP statute and regulations: installation of the specific materials meeting the specific standards listed in Appendix A of the DOE weatherization regulations at 10 CFR part 440; installation of materials meeting the specific standards incorporated by reference in Appendix A; and weatherization activities specifically allowed by official DOE correspondence and memoranda. LIHEAP grantees requesting a waiver of the LIHEAP statutory weatherization maximum who propose to carry out these weatherization activities may cite these sources as the criteria under which they have determined that these activities have been shown to produce measurable savings.

In addition to listing requirements for a "standard" weatherization waiver for grantees that meet the three criteria discussed above, this final rule sets criteria for a "good cause" waiver for grantees that wish to use more than 15 percent of their LIHEAP funds for weatherization, but do not meet one or more of the three criteria for a "standard" waiver. As noted earlier in this preamble, the final rule includes additional requirements at section 96.83(e) for a "good cause" waiver, regarding the length of the grantee's application period and the grantee's outreach efforts, for heating, cooling, and/or crisis assistance applications, from the preceding fiscal year to the fiscal year for which the waiver is requested.

Requests for both "standard" and "good cause" waivers must include comparison of the grantee's best estimates of service and benefit totals for the year for which the waiver is requested with service and benefit totals for the preceding fiscal year. The criteria for a "good cause" waiver include the requirements that grantees explain the reasons they are not maintaining the prior year's service and/or benefit levels, as appropriate, demonstrating good cause for failing to maintain these levels and justifying use of additional funds for weatherization. Reasons for failing to maintain service levels might include reduction in need and/or fewer applications for assistance due to improvement in economic conditions and decline in unemployment, warmer than normal winter weather, and/or lower home energy costs for low-income households. As indicated earlier in this

preamble, we also will consider arguments and documentation (e.g., cost benefit analysis) that greater benefits will accrue to recipients from use of funds for weatherization than for cash assistance. Further, we will consider arguments that service or benefit levels were higher in the preceding year because of supplemental appropriations enacted in response to unusual conditions, such as abnormally cold winter weather and/or large fuel price increases.

"Good cause" waiver requests also must include a comparison of the grantee's LIHEAP heating, cooling, and crisis assistance eligibility standards (eligibility criteria), benefit levels, application periods, and outreach efforts for the fiscal year of the waiver request and for the preceding fiscal year. If the eligibility standards were less restrictive, the benefit levels were higher, the application periods were longer, and/or the outreach efforts were greater for one or more of these program components in the preceding year, the "good cause" waiver request must include an explanation demonstrating good cause why a waiver should be granted in spite of this fact. In addition, other actions that led to a reduction in the number of applications for heating, cooling, and/or crisis assistance must be addressed. We will review this information to determine whether a waiver would be consistent with congressional intent to maintain service and benefit levels.

"Good cause" documentation should cite measurable, quantified data, and the sources for these data. For example, grantees documenting reduction in need for cash benefits may provide comparison of unemployment statistics, Aid to Families with Dependent Children (AFDC) and other public assistance reciprocity data, and the number of applications for LIHEAP assistance, for the current and the preceding fiscal year. Grantees documenting milder weather may cite National Weather Service data comparing heating or cooling degree days for their service area, as appropriate. Grantees documenting decreased home energy costs preferably should cite actual prices/costs in the local service area, as discussed earlier in this preamble.

#### *Public Inspection and Comment*

Consistent with the requirements and legislative history of Public Law 101-501, the final rule maintains the requirement from the interim rule that grantees provide opportunity for timely and meaningful public review of, and comment on, their proposed

weatherization waiver requests. The final rule adds the requirement that proposed waiver requests, and any preliminary waiver requests, be made available until at least March 15 of the fiscal year for which the waiver will be requested. As discussed earlier in this preamble, it also adds the requirement that written public comments on the proposed waiver request must be made available for public inspection upon their receipt by grantees, as must any summaries prepared of these written comments, and transcripts and/or summaries of any verbal comments made on the request at public meetings or hearings. Consistent with House of Representatives Conference Report 101-816, this public comment procedure does not require hearings. Once grantees have submitted waiver requests to HHS, copies of the entire waiver request submission must be made available for public inspection.

For example, we expect grantees to provide notification about proposed waiver requests with enough lead time to allow interested parties a reasonable period in which to comment. We also expect grantees to specify what a LIHEAP weatherization waiver request is the (or a) topic of a meeting or request for comments, rather than simply to indicate that issues of general social services interest are involved.

The final rule requires at section 96.83(c) that grantees include with their waiver requests a description of how and when the proposed waiver request was made available for timely and meaningful public review and comment, copies or summaries of public comments received, a statement of the method for reviewing public comments, and a statement of the changes, if any, that were made in response to these comments. Also, as discussed earlier in this preamble, the final rule adds the requirement that waiver requests include transcripts and/or summaries of any comments made on the request at public meetings or hearings.

#### *Submission and Review of Waiver Requests*

Requests for waiver of the weatherization maximum must be made by the grantee's chief executive officer or designee, in writing. They should be sent to the Director, Office of Community Services, Administration for Children and Families, Department of Health and Human Services, 370 L'Enfant Promenade, S.W., Washington, D.C. 20447.

HHS may require additional clarification or documentation as it determines necessary to decide whether

a grantee fully satisfies the appropriate waiver requirements.

We will review all requests and make a decision within a maximum of 45 days of receipt of a completed request. We expect that most requests will be handled much more quickly than this. A need for additional information from the grantee will delay the start of this time period and delay the decision.

HHS will approve all waiver requests that, in its judgment, meet all statutory and regulatory requirements for either a "standard" or a "good cause" waiver and that demonstrate adequate solicitation and consideration of public comments.

No waiver will be granted after the end of the fiscal year for which the funds are appropriated. Accordingly, waiver requests must be submitted in sufficient time before the end of the fiscal year to allow for HHS review and grantee obligation of funds that cannot be carried forward.

#### *Effective Period*

Waivers will be effective from the date of HHS's written approval until the funds are obligated in accordance with the LIHEAP statute and regulations.

A grantee that has received a waiver is not required to use the full approved amount for weatherization. If a grantee decides to use less than the approved waiver amount for weatherization, it should amend its LIHEAP plan to reflect this decision.

Funds for which a weatherization waiver is granted may be carried over to the following fiscal year, consistent with standard statutory and regulatory requirements for obligation and carryover of LIHEAP funds, and may retain their designation as funds to be used for weatherization, if the grantee so chooses. However, any carried-forward "waiver funds" that retain this designation may not be considered "funds available" or "funds allotted" for the purpose of calculating the maximum amount that may be used for weatherization in the succeeding fiscal year.

#### *Section 96.84 Miscellaneous*

The January 1992 interim final rule consolidated three brief regulatory provisions under section 96.84. They are: a provision relating to rights and responsibilities of territories, a provision concerning applicability of the LIHEAP statutory assurances, and a provision concerning prevention of waste, fraud, and abuse in grantee LIHEAP programs. We consolidated these provisions due to space limitations in the LIHEAP portion of the block grant regulations. Also, the

interim rule amended the provision dealing with applicability of the assurances to indicate that the new assurance 15, discussed below, which was added to the LIHEAP statute as section 2605(b)(15) by Public Law 101-501, applies to heating, cooling, and energy crisis intervention assistance.

We received no comments on this consolidation. The final rule makes no change to section 96.84.

#### *Section 96.86 Exemption From Requirement for Additional Outreach and Intake Services*

Public Law 101-501 added a new LIHEAP statutory assurance—assurance 15—to which States must certify in their applications for LIHEAP funding. Under the new section 2605(b)(15), beginning in FY 1992, States that provide outreach and intake for heating and cooling assistance and crisis situations through State departments of public welfare at the local level also must provide outreach and intake for these types of assistance through additional State and local governmental entities or community-based organizations. Examples of community-based organizations listed in the statute are not-for-profit neighborhood-based organizations, area agencies on aging, and community action agencies. In States where such entities or organizations did not administer these functions as of September 30, 1991, preference in awarding grants or contracts for intake services is to be provided to agencies that administer the low-income weatherization or energy crisis intervention programs.

#### *Exemption of Indian Tribes, Tribal Organizations, and Some Territories*

The January 1992 interim final rule established a new section 96.86 that exempted Indian tribes and tribal organizations from this requirement. This new section also exempted territories with annual LIHEAP allotments of \$200,000 or less from the requirement.

In the preamble to the interim rule, we explained the reasons for this exemption. We concluded that the provision concerning alternate outreach and intake services is not appropriate to American Indian tribal grantees because of the nature of tribal governments and their relationship to their service populations. Assurance 15 refers to outreach and intake services “offered by State Departments of Public Welfare at the local level”—that is, by entities that administer public welfare programs. The legislative history for Public Law 101-501 refers specifically to agencies that administer the Aid to Families with

Dependent Children (AFDC) program. However, Indian tribes do not administer AFDC for their service populations. In accordance with Federal law and regulations, States provide AFDC assistance to eligible American Indians, including Indian people receiving LIHEAP assistance from tribes that receive direct LIHEAP funding. Indian tribes therefore do not have tribal departments or offices directly comparable to State departments of public welfare. We also noted that Indian tribes are close to their service populations. “Tribal” and “local” levels of administration generally are the same. Consequently, requiring tribes to provide for alternative outreach and intake services by additional governmental entities or community-based organizations would be inappropriate as well as inconsistent with the Federal government’s policy of Indian self-determination.

We also concluded that the new provision concerning alternate outreach and intake services is not appropriate to territories with regular LIHEAP allotments of \$200,000 or less annually. Experience has shown that each grantee incurs certain basic administrative costs in developing and implementing a LIHEAP program. Most territories (and tribes) receive relatively small LIHEAP allotments. We concluded that, for territorial grantees with annual LIHEAP funding of \$200,000 or less, the additional resources that would be required to provide alternative outreach and intake services would increase administrative and other non-benefit costs prohibitively and would significantly reduce the heating, cooling, crisis, and/or weatherization benefits that the territory could provide. We doubted that territories with LIHEAP allotments of \$200,000 or less would have the ability to provide meaningful LIHEAP benefit levels if they also were required to provide for additional outreach and intake services. The time, effort, and funds spent providing alternate outreach and intake services would be significantly out of proportion to the direct LIHEAP benefits that could be provided to eligible households.

In addition, the territories with current LIHEAP allotments of \$200,000 or less that do not consolidate LIHEAP funds under other programs pursuant to Public Law 95-134, commonly referred to as the Omnibus Territories Act, administer LIHEAP entirely at the central territorial level. Because of their relatively small populations, they do not have separate local administering agencies. We concluded that a requirement for alternative local

agencies would be inappropriate under these circumstances.

This means that at current LIHEAP funding levels, all territories except the Commonwealth of Puerto Rico are exempt from this provision. The allotments of the territories in FY 1994, under the regular LIHEAP appropriation of \$1.437 billion, range from \$14,937 to \$68,807 for all territories except Puerto Rico, whose allotment is \$1,708,030.

We received one comment, from a tribal organization, supporting the exemption of tribal and small territorial grantees from this requirement. We received no comments opposing the exemption.

Consistent with our previously stated rationale and with this comment, we are continuing to exempt Indian tribes and tribal organizations, and territories with annual regular LIHEAP allotments of \$200,000 or less, from the requirement of section 2605(b)(15) of the LIHEAP statute, as amended.

Although these tribal and territorial grantees are exempt from this requirement for additional outreach and intake services, they are still subject to the requirements in section 2605(b)(3) of the LIHEAP statute—assurance 3—concerning outreach. Under this assurance, all grantees must “conduct outreach activities designed to assure that eligible households, especially households with elderly individuals or disabled individuals, or both, and households with high home energy burdens, are made aware of” LIHEAP and similar energy-related assistance.

#### *Other Comments and HHS Responses*

The interim final rule provided guidance to States on interpretation and implementation of the requirement for additional outreach and intake services. The interim rule’s preamble noted that grantees had requested such guidance and that Senate Report 101-421 said that HHS is expected to provide guidance on compliance with this requirement.

However, we did not provide detailed requirements on interpretation and implementation in the regulation itself. The preamble stated:

“As the original block grant regulations and preamble explain, consistent with statements of congressional intent, the Department’s philosophy on block grants is that grantees are to be given as much flexibility as possible to implement the programs in their own jurisdictions. We will accept a grantee’s interpretation of a statutory requirement unless the interpretation is clearly erroneous.

\* \* \* \* \*

“We will review the grantees’ compliance with the appropriate legislative and regulatory requirements in carrying out our

responsibilities to conduct LIHEAP compliance reviews, application reviews, complaint investigations, and resolution of audit findings. However, consistent with the block grant philosophy, we are not publishing Federal rules on how the requirement for additional outreach and intake services must be implemented by grantees, except to specify that it does not apply to Indian tribes and tribal organizations or to territories receiving \$200,000 or less in annual LIHEAP allotments. This is also consistent with our regulatory treatment of other application assurances required by the statute."

We received nine comments on the statutory and regulatory provisions relating to the requirement for additional outreach and intake services (including the comment from a tribal organization mentioned previously).

#### *Comments and Response*

Two of the commenters were members of Congress who requested a specific rule to explicitly implement assurance 15. Another letter supported a rule that would include definitions of a number of terms relating to this assurance.

We continue to believe that it would be inconsistent with the block grant philosophy as expressed in law and legislative history to publish Federal rules mandating specific ways in which States must implement this statutory requirement. The LIHEAP statute specifies in section 2605(b), which contains the assurances: "The Secretary may not prescribe the manner in which the States will comply with the provisions of this subsection."

Another commenter believed that States might take assurance 15 "less seriously because it is not included in the regulations themselves." However, the statute is paramount. Further, the chief executive officer of each State must certify that the State agrees to these assurances. Federal regulations are not intended simply to repeat the law. It is consistent with our treatment of the LIHEAP statute's other assurances—which are as important as assurance 15—not to issue regulations mandating specific ways in which grantees must implement them.

We will continue to carry out our responsibilities to help assure that grantees comply with the statute. We review grantees' compliance with the statutory assurances when we conduct compliance reviews (including reviews for compliance purposes of funding applications), and when we resolve audit findings and complaints. Public Law 103-252 (the Human Services Amendments of 1994) amends the LIHEAP statute to require that States include in their LIHEAP applications a

description of how they will carry out assurance 15; this will help us in our monitoring. We resolve grantee failure to comply with the statute through appropriate enforcement proceedings. If we find while carrying out our compliance responsibilities that several grantees have misunderstood a statutory provision, it may be appropriate for us to clarify by regulation, as we did in October 1987 regarding the applicability of assurance 9's administrative cost requirements to subgrantees and contractors as well as to grantees.

#### *Comment and Response*

One of the congressional commenters said that the final rule should contain "strong regulation" stating that alternative outreach and intake "must be performed in a professional manner, with strict contract standards for agency accountability and paid for as part of the administrative or program expenditures of the LIHEAP program."

We agree that the requirements of assurance 15 must be carried out by States and by entities and persons acting on their behalf in a competent manner, by qualified agencies with effective standards for accountability. This is the case for all of the LIHEAP statutory assurances. In applying for Federal LIHEAP funds, the State has specifically assured the Federal government that it will carry out all of these assurances. In accepting Federal LIHEAP grant funds, the State has made a commitment to follow the requirements of all applicable Federal laws and regulations.

However, we do not believe that assurance 15 requires that alternative outreach and intake be "paid for as part of \* \* \* the LIHEAP program"—i.e., always provided as a paid LIHEAP function or activity and never provided on an unpaid, voluntary basis. The LIHEAP statute does not specify that alternative outreach and intake must be provided on a paid basis. And, as previously stated, the statute specifies that HHS "may not prescribe the manner in which the States will comply" with the assurances. Further, we believe that the legislative history assumes that alternative outreach and intake provided by appropriate entities/organizations on an unpaid, voluntary basis will meet the assurance's requirements. Conference Report 101-816 specifies that if States "are already offering alternate intake sites in some areas, this section does not require them to modify their system of program management in those areas." Senate Report 101-421 indicates that, if alternative services previously were provided voluntarily, providers should continue to maintain comparable levels

of efforts voluntarily, stating that "local entities now providing such [outreach and intake] services voluntarily are expected to maintain comparable levels of effort in addition to the new activities which may be contracted to them pursuant to this provision." As we stated in the preamble to the interim rule, assurance 15 should not be used as a basis for reducing voluntary efforts.

While the law does not require that alternative outreach and intake be provided by entities or organizations "paid \* \* \* as part of the \* \* \* expenditures of the LIHEAP program," States should not attempt to compel local entities/organizations to provide these services on an unpaid basis. Many—if not most—such entities do not have the resources to provide LIHEAP outreach and intake without appropriate payment. While we support the use of volunteer outreach and intake when appropriate, our guidance is not intended to encourage States to require local agencies to provide these services at no cost to the State. The Senate report says that "State LIHEAP programs are expected to use LIHEAP administrative funding for any additional LIHEAP activities required by this section, rather than relying on other federal funds in local agencies." (We have found that grantees' classification of certain outreach functions—such as energy conservation education—as non-administrative is not clearly erroneous.) Also, if an alternative governmental entity or community-based organization freely—without pressure or coercion—agrees to provide additional outreach and/or intake services without charge, we believe that assurance 15 does not require the grantee to pay it for providing these services.

#### *Comments and Response*

Several commenters indicated that the discussion in the interim rule's preamble on the participation of utilities and other home energy vendors in LIHEAP outreach might imply that these vendors could be considered "community-based organizations" whose participation in LIHEAP outreach and/or intake could meet assurance 15's requirement for additional outreach and intake. These commenters said that utilities and other vendors are not community-based organizations. One letter rejected "the notion that low-income clients may be given a choice by the State of applying for LIHEAP at the AFDC office or at the office of their creditor, the utility, to whom they would be required to submit income documentation for scrutiny." Another noted that vendors' relationships with their clients "can be adversarial"—

clients may need to bargain with their vendors over payment agreements, arrearage payments, etc. "They may even have to resolve disputes in a regulatory setting. \* \* \* In these circumstances, the confusion between access to the program and contact with a creditor that could be created by vendor outreach and intake may discourage the very expansion of access that the law intends to encourage." Two commenters asserted that "community-based organizations" must be nonprofit local agencies/organizations.

We continue to encourage cooperation between grantee LIHEAP programs and home energy vendors, and use of vendors to provide LIHEAP outreach as appropriate. But upon further reflection, we agree with these commenters that outreach and/or intake provided by home energy vendors, including utility companies, does not meet assurance 15's requirement for additional outreach and intake services. We agree that the issues with respect to vendors' status as creditors are significant. In addition, "community-based organization"—historically a "term of art" used in Federal anti-poverty programs—generally refers to nonprofit entities; utilities and other home energy vendors generally are for profit. (For example, regulations for the former Community Services Administration at 45 CFR 1076.50–1(c) defined "community-based organization" as "a cooperative or private nonprofit organization at least 50 per centum of whose governing body is composed of local area residents. \* \* \*")

#### *Comment and Response*

A commenter believed that "the statute required States to ensure that all interested organizations, including vendors, engage in outreach. \* \* \*" The statute requires that, "in addition to" outreach and intake offered by State public welfare departments at the local level, there must be outreach and intake for heating, cooling, and crisis assistance "that is administered by additional State and local governmental entities or community-based organizations. \* \* \*" Comparable levels of outreach and intake services should be provided for welfare and non-welfare households and, if feasible, States should use a number of different service providers. However, we do not believe that the statute requires States to ensure that "all interested organizations \* \* \* engage in outreach."

#### *Comments and Response*

A commenter believed that intake functions were "appropriately described in the guidance." Another commenter

thought that intake might be "too narrowly defined, given the legislative history." The statute does not define or otherwise indicate what "intake" includes; both the conference report and the Senate report refer to "intake or application processing." The interim rule's guidance noted functions that are "generally" included as intake (receipt of applications for assistance and the opportunity for applicants to provide any missing information for their applications). It also noted that States have "the discretion to choose whether to include" certain other functions (income determination and verification, and preliminary eligibility or benefit determination). We continue to believe that it is appropriate for grantees to have this degree of flexibility in defining the term—that they should not be required to include all application processing tasks as part of "intake."

#### *Comments and Response*

A State noted that mail-in applications can be acceptable for intake and recommended a similar accommodation for outreach. Information sent by mail about LIHEAP can be an effective part of a grantee's outreach effort. However, outreach by mail will not by itself meet the requirement for alternate outreach services. Many low-income households would not be reached, or adequately served, by outreach-by-mail. As the Senate report explains, outreach efforts should be varied and targeted to the different populations eligible for LIHEAP assistance—such as welfare households, non-welfare households, and the elderly—"to assure that these households have an effective way to learn about the program and how to apply for benefits."

The same State recommended that if "the local welfare office has an established local advisory board represented by those agencies that are listed [in assurance 15] as potential alternative sites, that the outreach requirement is met." However, assurance 15 requires more than participation in an advisory or other board by alternate agencies. It specifically requires that alternative outreach and intake functions be "administered by additional State and local governmental entities or community-based organizations," and is intended to provide information directly to low-income individuals, not just to other agencies.

The State also proposed that a phone-in intake process for households experiencing an energy crisis be considered to meet the statutory requirements for crisis assistance. In

some circumstances, receiving a telephone call by a household experiencing an energy crisis would be an appropriate and effective first step as intake, although information on the crisis and the household's eligibility would need to be verified. However, some low-income households do not have a telephone or reasonable access to a telephone that they can realistically use, and section 2604(c) of the LIHEAP statute specifically requires each entity that administers LIHEAP crisis assistance to accept crisis assistance applications "at sites that are geographically accessible to all households in the area."

A commenter believed that the interim rule's preamble guidance might "inadvertently encourage" welfare departments "to conduct exclusively mail-application intake." The guidance is not intended—and should not be interpreted—as encouragement for exclusively mail-application intake.

#### *Comments and Response*

Two States objected to the requirements of assurance 15. One objected to the increased expenditures needed to provide additional outreach and intake—with reduced funds therefore available for benefits. The State said that the "effort and funds spent" to provide additional services "would be significantly out of proportion to the direct benefits that could be provided to eligible households." Another State defended its effectiveness in reaching nonwelfare households and objected "to the use of limited funding to replicate a function already being administered timely and effectively." The State believed that it would be extremely difficult to meet the requirement in section 2604(c) of the LIHEAP statute that assistance to resolve an energy crisis be provided within 48 hours of an eligible household's application for crisis assistance. This grantee requested that assurance 15 be deleted, or waived for grantees "already serving a broad based population."

Only Congress can "delete" a statutory provision, and HHS does not have authority to waive statutory requirements for States. The conference report states that the conferees "recognize the potential for significantly increased administrative expenses for some states to comply with the new alternative site requirements, and intend to monitor possible effects on the program and recipients."

#### *Guidance Regarding Additional Services*

The preamble to the January 1992 interim final rule included guidance

with respect to section 2605(b)(15) of the LIHEAP statute. With modifications and clarifications contained in the preamble to this final rule, that guidance is still effective and is included as the remainder of this final rule's preamble discussion of section 96.86 of the block grant regulations and of assurance 15.

The requirement for additional outreach and intake services applies to States (including the District of Columbia) and to any territory with a LIHEAP allotment larger than \$200,000 for the fiscal year in question, when local offices of the grantee department or agency that administers AFDC or the territorial equivalent basic cash public assistance program(s) provide outreach and intake for heating, cooling, and/or crisis assistance in all or part of the State or territory. The requirement applies in these cases whether or not that department or agency is named "State Department of Public Welfare" or "Department of Public Welfare."

The requirement applies whether or not the department or agency provides some of these services outside its own offices. Section 2605(b)(15) requires that grantees "provide, in addition to such services as may be offered by State Departments of Public Welfare at the local level, outreach and intake functions for crisis situations and heating and cooling assistance that is administered by additional State and local governmental entities or community-based organizations.\* \* \*." The provision does not refer to the locations where the welfare department provides services. Therefore, stationing a welfare department employee at a shopping mall, for example, will not meet the requirement of this provision.

Consistent with Conference Report 101-816, if grantees are already offering alternative services in some areas, they are not required to modify their system in these areas. Consistent with Senate Report 101-421, "a reasonable share" of outreach and intake functions is to be administered through alternative agencies, assuring that, to the extent possible, all eligible households in the grantee's service population will have viable access to alternative service sites. However, consistent with this Senate report, if the grantee finds no alternative in an area or areas after engaging in an open solicitation process, the grantee is not required to create new entities. (In such a case, the grantee would not be required to solicit for alternate agencies each succeeding year. However, periodic assessment of the situation will enable the grantee to determine when further solicitation is likely to provide

an alternative and is therefore appropriate.)

Also consistent with the Senate report, if such services previously were provided voluntarily, providers should continue to maintain comparable levels of effort voluntarily. The new requirement should not be used as a basis for reducing voluntary efforts. Neither should it be used to compel or require voluntary efforts.

Consistent with the legislative history, we encourage the voluntary participation of community groups and organizations, including churches, and of utilities and other home energy vendors, in outreach activities. Such entities often have excellent knowledge of and access to low-income households who may need LIHEAP assistance. However, as explained earlier in this preamble, utilities and other home energy vendors are not "community-based organizations" for the purposes of the requirement of section 2605(b)(15) for outreach and intake services provided by "additional State and local governmental entities or community-based organizations. . . ."

In order to meet the requirement for alternative outreach and intake services, the statute specifies that the alternative service providers must be State or local governmental entities or community-based organizations. Senate Report 101-421 mentions public or nonprofit agencies including other State or local government agencies, and community-based organizations such as community action agencies and aging organizations.

The Senate report emphasizes the importance of providing sufficient access to the LIHEAP program to the non-welfare poor and the elderly, through additional outreach efforts and appropriate intake locations. Grantees should provide varied outreach efforts targeted to the different populations eligible for LIHEAP assistance. Further, grantees should consult with low-income individuals and other interested parties to determine the best ways to implement the requirement for additional outreach and intake services. As a commenter stated, the intention of assurance 15 is "to broaden the access and availability of LIHEAP services to those who are eligible but are not part of the welfare system" and "to give preference for intake functions to those agencies that provide weatherization and/or crisis assistance." Agencies with experience in successfully managing similar Federal grant programs should be used when feasible.

The term "intake" generally includes receipt of applications for assistance and the opportunity for applicants to provide any missing information that is

needed to complete their applications. Each grantee has the discretion to choose whether to include income determination and verification responsibilities, and preliminary eligibility or benefit determination, as "intake." The conference report states that the "conferees believe that intake or application processing" is "best provided by experienced service providers with approved federal and state grant management systems."

If a mail-in application system administered by a welfare department is used for a grantee's heating and/or cooling assistance programs, and if it is not necessary to designate local administering agencies to carry out intake for these components, then there is no need under section 2605(b)(15) to designate other State and local governmental entities or community-based organizations to carry out intake for these components. In such a case, the grantee should assure that help is readily available to households that are unable to prepare and/or mail their applications without such assistance. Also, grantees should not change to a system of mail-in applications in order to avoid designating additional local intake agencies.

Section 2604(c) of the LIHEAP statute requires each entity that administers energy crisis assistance "to accept applications for energy crisis benefits at sites that are geographically accessible to all households in the area to be served" by the entity and to provide to physically-infirm low-income persons the means to submit applications for energy crisis benefits without leaving their residences or to provide the means to travel to the sites at which the entity accepts applications. The statute thus requires that there be energy crisis intake sites and services at the local level. Therefore, intake for crisis assistance provided solely by welfare departments will not meet the requirement in section 2605(b)(15) concerning additional intake services at the local level. Also, telephone intake can be part of a State's intake process but will not by itself meet the statutory requirements for intake services.

It is our experience that outreach normally is provided through local administering agencies, and therefore additional outreach services would be necessary if outreach currently is provided at the local level only through the welfare department.

In enacting the requirement that additional outreach and intake services be provided in certain cases, Congress has emphasized the importance of adequate and appropriate outreach and intake functions in grantee LIHEAP

programs. Congress also has specifically limited the amount of Federal funds that can be used for costs of LIHEAP administration and planning to 10 percent of the funds payable to a State and not transferred to another HHS block grant program (section 2605(b)(9) of the LIHEAP statute). (The block grant regulations provide somewhat higher administrative cost limits for Indian tribes, tribal organizations, and territories.) As we stated in the preamble to the block grant regulations of July 6, 1982, "The consistent imposition of limits upon administrative expenditures under the various block grants is indicative of congressional intent that States devote a very high percentage of their block grant funds to direct payments or services" (47 FR 29477). Grantees should make every effort to provide the maximum amount of direct LIHEAP assistance to low-income households, consistent with the provision of adequate support services.

Although grantees subject to the new requirement may categorize some of their additional outreach expenses as non-administrative, many of the additional costs will be administrative. Some grantees may have difficulty providing additional outreach and intake services and remaining within the statutory limitation on use of Federal funds for costs of LIHEAP planning and administration. These grantees, in particular, may need to examine all of their LIHEAP activities and costs to determine ways to increase efficiency, to encourage voluntary efforts, and to use their own funds to supplement Federal LIHEAP funds. HHS does not have authority to waive the statutory limitation on administrative costs. The requirement for additional outreach and intake services does not relieve grantees of the need to comply with this statutory limitation.

Consistent with Conference Report 101-816, HHS used FY 1992 LIHEAP training and technical assistance funds to help thirteen States that previously had provided outreach and intake solely through their public welfare departments, to make the transition required by assurance 15.

Although this preamble modifies and clarifies some of the guidance regarding assurance 15, the final rule makes no change to section 96.86 of the block grant regulations.

#### *Section 96.87 Leveraging Incentive Program*

Public Law 101-501 added a new section 2607A to the LIHEAP statute, establishing a leveraging incentive

program, and amended section 2602 of the LIHEAP statute, authorizing funds for this program. Under the leveraging incentive program, beginning in FY 1992, HHS may allocate supplementary LIHEAP funds—leveraging incentive funds—to grantees that have acquired non-Federal leveraged resources and use these non-Federal resources to expand the effect of Federal LIHEAP dollars.

The interim final rule published January 16, 1992, added a new section 96.87 to the block grant regulations to implement the leveraging incentive program. Consistent with the requirements of section 2607A, the interim final rule included requirements for countable leveraged resources and for calculation and documentation of the value of leveraged resources, submission of leveraging reports to HHS, calculation of grantee shares of leveraging incentive funds, and use of leveraging incentive funds.

Discussing the leveraging program, Senate Report 101-421 notes that, "if the LIHEAP program uses its purchasing power (or 'leverage') to acquire the full economic value of its resources, it can acquire substantial additional energy assistance resources and services for the poor from state energy market sources." This report lists the following examples of leveraged resources: "state-appropriated funds, quantifiable payments, discounts, credits, energy conservation improvements or other measurable benefits to eligible households in excess of the energy that could be purchased by the LIHEAP program at commonly available residential rates."

All LIHEAP grantees—States (including the District of Columbia), Indian tribes, tribal organizations, and territories—may participate in the leveraging incentive program. Grantees are not required to participate in the leveraging program. We encourage grantees to leverage additional resources to supplement their Federal LIHEAP funds, whether or not they choose to request leveraging incentive funds.

Leveraged resources are counted in the "base period" in which their benefits were provided to low-income households. For example, grantee funds added to the LIHEAP program are countable only when the benefits they pay for—such as heating assistance payments or weatherization services—are provided to or on behalf of low-income households.

Under the statute's terms, grantees that want to apply for leveraging incentive funds must submit a report to HHS that quantifies the grantee's leveraged resources for the preceding fiscal year (the base period), less any

costs incurred by the grantee to leverage the resources and any costs imposed on federally eligible households.

Leveraging incentive funds to reward these leveraging activities are awarded in the fiscal year following the fiscal year in which the leveraged resources/benefits were provided to low-income households. In other words, they are awarded later in the fiscal year in which the leveraging reports are submitted, after HHS has reviewed the reports, adjusted claimed resources and their valuation as appropriate, and calculated leveraging incentive grant amounts. The leveraging incentive program's first "base period" was FY 1991, and its first "award period" was FY 1992; leveraging activities in FY 1991 were the basis for the leveraging incentive grant awards HHS made in FY 1992. Section 2607A of the LIHEAP statute requires that grantees use leveraging incentive funds awarded to them only "for increasing or maintaining benefits to households."

As the interim rule's preamble explained, consistent with the block grant legislation and legislative history, HHS' policy generally is to provide maximum flexibility to grantees to operate their LIHEAP programs. Grantees are the primary interpreters of the LIHEAP statute and the primary administrators of the LIHEAP program. However, grantees apply "competitively" to HHS for shares of a limited amount of leveraging incentive funds. Shares are determined based on reports submitted by grantees which describe, and quantify the value of, the resources they have leveraged. It is therefore necessary that all grantees applying for leveraging incentive funds use the same rules. There must be standard criteria and methods for determining the resources that are countable under the leveraging incentive program and for quantifying the value of these resources. In the interim rule and in this final rule, we have tried to make these criteria and methods as clear and fair as possible, within the limits of the statute and legislative history.

#### *Public Comments, HHS Responses, and Changes: Section-by-Section Discussion*

Twenty-four of the 25 letters we received on the interim final rule included comments on the leveraging incentive program. Several of the commenters addressed the interim rule and its preamble in general. For example, one believed that the complex statutory instructions for the leveraging program require the implementing regulation to be "instructive yet flexible" and said that the interim rule "generally meets these sometimes

conflicting purposes in an understandable and common-sense fashion." Another appreciated HHS' philosophy of keeping the rules for the leveraging program "within the spirit of a block grant." A third supported HHS' decision to exempt grantees' use of leveraging incentive funds from some requirements that apply to regular LIHEAP funds.

Most comments concerned specific leveraging provisions. These comments, and our responses, are discussed below under the appropriate headings.

The section and subsection headings are essentially the same in the interim final rule and the final rule. While we made some substantive changes, we retained the structure and most of the content of the interim rule. We made some nonsubstantive changes for clarity and consistency, as well. The changes are based on the public comments on the interim rule and on our experience in operating the leveraging incentive program under the interim rule.

#### *Scope and Eligible Grantees*

Subsection (a) of § 96.87 of the interim final rule explained that § 96.87 concerns the leveraging incentive program authorized by section 2607A of the LIHEAP statute. We received no comments on this statement of the scope of the section, and we retained it in the final rule in a new paragraph (1) under § 96.87(a).

After the comment period on the interim rule, we received an informal comment from a tribal grantee about entities eligible to receive leveraging incentive funds. A tribal organization and its member tribes had leveraged resources while the organization received direct regular LIHEAP funding on the tribes' behalf; the tribes wanted to apply for their own direct regular funding—and the leveraging incentive funds to reward the leveraged resources—in the next fiscal year. However, the preamble to the interim rule stated that, in order to receive leveraging incentive funds, "grantees must receive regular LIHEAP block grant funding directly from HHS in both the 'base' year for which their leveraging activities are reported and the 'award' year for which leveraging incentive funds are requested" (57 FR 1965). We agree with the tribal grantee that credit for leveraging should be "portable" when a tribe enters or leaves a tribal organization when certain conditions are met—for example, a tribe or tribal organization that applies for leveraging incentive funds also must apply for and receive direct regular LIHEAP funding in the award period in order to receive incentive funds. We do not want to

require tribes to continue existing administrative relationships in order to qualify for incentive funds. We modified the statement of entities eligible for leveraging incentive funds accordingly and added the revised statement in a new paragraph (2) under § 96.87(a) in the final rule itself, for clarity and because of its importance.

Under the revised statement, if a tribe leveraged resources while receiving regular LIHEAP services under a directly-funded tribal organization in the base period, and then receives direct regular LIHEAP funding on its own in the award period, the tribe is eligible to receive leveraging incentive funds to reward these resources in the award period. If a tribe leveraged resources while receiving direct LIHEAP funding in the base period and receives LIHEAP services under a tribal organization in the award period, the tribal organization is eligible to receive leveraging incentive funds on the tribe's behalf to reward these resources in the award period. If a directly-funded tribal organization leveraged resources in the base period and one or more of the tribes it had served apply for direct funding in the award period, the tribes and/or the tribal organization should inform HHS in writing about the desired fair and appropriate distribution of leveraging incentive funds in the award period. If the tribes and/or the tribal organization are unable to agree, HHS will determine the distribution of the incentive funds among eligible applicants based on the comparative role of each entity in obtaining and/or administering the resources, and/or their relative numbers of LIHEAP-eligible households.

#### *Definitions*

Section 96.87(b) of the interim final rule defined five terms used in the leveraging incentive program. We received no comments on four of the definitions—of "base period," "home energy," "low-income households," and "weatherization." These definitions remain substantively unchanged in the final rule.

We received several comments relating to the fifth definition—"countable petroleum violation escrow funds." These comments, and the changes we made in response, are discussed later in this preamble, under "Countable Leveraged Resources and Benefits" and "Leveraging Issues Relating to Tribal Grantees."

We added two definitions in the final rule—of "award period" and "countable loan fund." We defined "award period" because—like "base period," which already was defined in the interim

rule—"award period" is an important and basic term whose meaning must be clear. Countable loan funds and issues related to them are discussed later in this preamble, under "Countable Leveraged Resources and Benefits" and "Resources and Benefits That Cannot Be Counted."

#### *LIHEAP Funds Used To Identify, Develop, and Demonstrate Leveraging Programs*

Section 96.87(c) of the interim final rule and of this final rule concern LIHEAP funds used to identify, develop, and demonstrate leveraging programs.

Section 2607A(c)(2) of the LIHEAP statute provided that, each fiscal year, States may spend up to the greater of \$35,000 or 0.0008 percent of their funds allocated under the LIHEAP statute to identify, develop, and demonstrate leveraging programs. Consistent with § 96.87(g)(5) of the interim rule, in grantees' leveraging reports to HHS, all funds from grantees' regular LIHEAP allotments that are used under the authority of section 2607A(c)(2) to identify, develop, and demonstrate leveraging programs are to be deducted as offsetting costs in the base period in which these funds were obligated, whether or not there are any resulting leveraged benefits.

As we noted in the interim rule's preamble, 0.0008 percent of the largest FY 1991 State LIHEAP allotment was approximately \$1,700; clearly \$35,000 was the larger in all cases, and \$35,000 would be the larger under all foreseeable LIHEAP appropriation levels. Therefore, we determined that if the language were carried out as written, the result would appear to be illogical and inconsistent with reason. We concluded that the figure 0.0008 percent resulted from a typographical error and that 0.0008 was intended to be the actual factor by which the State's allotment is multiplied, rather than the percent. (When calculating 0.08 percent of a State's allotment, one multiplies the allotment by the factor 0.0008.) In the interim final rule, we clarified that the figure is 0.08 percent. This interpretation provided a meaningful result, since 0.08 percent of the FY 1991 State LIHEAP allotments ranged from approximately \$1,200 for the State with the smallest allotment to \$170,000 for the State with the largest allotment; \$35,000 was the larger in some cases, and 0.08 percent was the larger in other cases. We received one comment agreeing with this interpretation and none disagreeing.

Since then, the Human Services Amendments of 1994 (Public Law 103-252) confirmed our interpretation and

corrected the percent in the LIHEAP statute, which now says "0.08 percent." We kept this same, corrected figure in the final rule.

#### *Comments and Response*

In the interim rule we also determined that \$35,000 would be a disproportionate amount for most tribes, tribal organizations, and territories to spend annually to identify, develop, and demonstrate leveraging programs. (As the preamble noted, FY 1991 tribal allotments ranged from approximately \$1,100 to \$1,038,000; the allotments of 84 of the 115 tribal grantees were under \$100,000. FY 1991 territorial allotments ranged from approximately \$15,000 to \$1,711,000; the allotments of five of the six territorial grantees were under \$100,000.) The interim rule therefore limited to two percent of their annual LIHEAP allotments the amount that these grantees may spend each fiscal year for these purposes. This is approximately the same percent as the territory with the largest allotment would have spent if it had used \$35,000 of its FY 1991 allotment for these purposes (\$35,000 divided by \$1,711,284 equals 0.0204524 or 2.04524 percent).

We received no written comments on this provision. Several tribal grantees have told us informally, however, that they believe that the two percent limit is too low.

For most tribes and territories, we believe that two percent is a realistic amount to use for these purposes. We recognize, however, that two percent of the smallest allotments will provide very little. For example, two percent of \$2,500 is only \$50. Therefore, in response to the concerns of small tribal grantees, the final rule provides that tribes, tribal organizations, and territories may use up to the greater of two percent, or \$100, of their annual LIHEAP allotments, specifically to identify, develop, and demonstrate leveraging programs. (For tribal organizations receiving LIHEAP funds on behalf of two or more tribes, the base to which the two percent and \$100 are applied is the tribal organization's total regular LIHEAP allotment, not the separate "allotments" of the individual tribes that designated the tribal organization to administer LIHEAP for them.) For grantees with allotments under \$5,000, \$100 is the larger and will provide a usable amount. (In FY 1992, 22 of the 120 tribal grantees, and no territorial grantees, had LIHEAP allotments under \$5,000.) To allow use of more than the greater of two percent or \$100 for these purposes—in addition to LIHEAP funds that can be used for

planning and administration—would adversely affect the grantee's ability to provide home energy assistance with its LIHEAP funds, which is the basic purpose of the LIHEAP program. We also note that the leveraging reports covering FY 1991, FY 1992, and FY 1993 leveraging activities show that most grantees used no LIHEAP funds to identify, develop, or demonstrate leveraging. Only two tribal grantees have reported using LIHEAP funds to develop leveraging. Only seven of the 63 grantees that received leveraging incentive funds for their FY 1992 leveraging activities said they used any LIHEAP funds for this purpose; only two of the seven used the maximum amount allowed.

#### *Related Issues*

The 0.08 percent maximum for States, and the two percent/\$100 maximum for tribes, tribal organizations, and territories, are based on and apply to the grantee's funds allocated under the LIHEAP statute. For the purpose of this provision, we defined this in the interim rule to mean the grantees' Federal LIHEAP allotments, including supplemental funds except leveraging incentive funds. We received no comments on this definition and have retained it in the final rule. Grantees may spend additional monies from their own funds or other sources as appropriate, to identify, develop, and demonstrate leveraging programs.

LIHEAP block grant funds that are used to identify, develop, and demonstrate leveraging programs are likely to support both planning and administrative activities and costs, and non-planning, non-administrative ("program") activities and costs. The interim rule stated that LIHEAP funds used under section 2607A(c)(2) of the LIHEAP statute to identify, develop, and demonstrate leveraging programs are not subject to the statute's limitation on the maximum percent of Federal funds that grantees may use for costs of planning and administration. As we stated in the interim rule's preamble, we believe that, if these funds were subject to the limitation, it would be a disincentive to grantees to develop leveraging programs. However, Congress established the leveraging incentive program to encourage—to provide an incentive to—grantees to leverage funds. We therefore concluded that LIHEAP funds used under section 2607A(c)(2) should be available in addition to the regular LIHEAP planning and administration limits. We received one comment supporting this decision. We have retained this provision in the final rule.

In addition to the maximum set by § 96.87(c) specifically for identifying, developing, and demonstrating leveraging programs, a grantee may find that part of the LIHEAP funds it spends for planning and administrative costs also have the effect of helping to identify, develop, and/or demonstrate leveraging programs. Since these are valid LIHEAP planning or administrative activities, paid for from the portion of a grantee's LIHEAP block grant funds that can be used for planning and administration, they are not subject to the 0.08 percent/\$35,000 limit for States or the two percent/\$100 limit for tribes/territories set by section 96.87(c). Thus, a grantee could, in effect, use somewhat more than the maximum 0.08 percent/\$35,000 or two percent/\$100 set specifically for identifying, developing, and demonstrating leveraging. This option is available to all LIHEAP grantees.

#### *Comment and Response*

A commenter said that, because these funds "are coming out of program funds" and do not count against the statutory limit on Federal funds used for LIHEAP administration and planning, HHS should request itemization of how they are spent. The commenter said that "[w]ithout this information, neither Congress nor advocates will have any sense of how these additional non-benefit, non-administrative funds will have been used." However, we have no indication that Congress wants HHS to collect and report this information, and we do not believe that we need to impose such an information collection and reporting burden on grantees in order to assure program accountability. We therefore decline to accept this suggestion. We do not require grantees to specify how they use their LIHEAP planning and administrative funds, and we are not requiring them to specify how they use their LIHEAP leveraging development funds. Consistent with the block grant philosophy and Federal paperwork reduction efforts, the only reports that LIHEAP grantees are required to submit are those that provide information necessary to meet requirements in the LIHEAP statute and the Single Audit Act. The LIHEAP leveraging report form and our voluntary LIHEAP telephone survey of States provide data on the amount—if any—that grantees spend to identify, develop, and demonstrate leveraging. We will check further on these activities when carrying out our compliance responsibilities—for example, when we conduct compliance reviews.

### *Basic Requirements for Leveraged Resources and Benefits*

Based on the provisions of section 2607A of the LIHEAP statute, § 96.87(d) of the regulation sets basic requirements for leveraged resources and benefits.

### *Information and Comment on Basic Requirements, Paragraph (1)*

In the interim rule, paragraph (1) of § 96.87(d) listed four criteria, all of which had to be met by countable leveraged resources/benefits.

The first two criteria under paragraph (1) implement requirements in section 2607A of the LIHEAP statute. They require that countable leveraged resources/benefits be from non-Federal sources, and be provided to the grantee's LIHEAP program or to federally qualified low-income households. We received no comments on these criteria; they remain the same in the final rule.

In accordance with the LIHEAP statute, leveraged resources that are provided to households that do not meet the Federal eligibility standards in section 2605(b)(2) of the statute cannot be counted under the leveraging incentive program. Federally qualified (federally eligible) low-income households are:

- Households with incomes that do not exceed the greater of 150 percent of the poverty level for their State, or 60 percent of State median income; and
- Households in which one or more individuals receive Aid to Families with Dependent Children, Supplemental Security income payments, food stamps, or certain need-tested veterans' and survivors' payments (payments under sections 415, 521, 541, or 542 of title 38 of the U.S. Code or section 306 of the Veterans' and Survivors' Pension Improvement Act of 1978).

If a countable leveraging program/activity provides benefits to both federally eligible households and households that do not meet Federal eligibility standards, the grantee should report only the benefits for households that are federally eligible.

The LIHEAP statute allows grantees to set eligibility standards for their LIHEAP programs that are more restrictive than these Federal maximums. The statute permits grantees to set their LIHEAP programs' income eligibility standard as low as 110 percent of the poverty level. The statute also permits grantees to decide whether to have categorical eligibility for their LIHEAP program and, if so, to decide which of the programs listed above to include. State eligible (State qualified) households are households that meet

the eligibility requirements set by a State for its LIHEAP program. A grantee may claim leveraged resources provided to federally eligible households even if the grantee set lower eligibility standards for its LIHEAP program, provided the resources meet all the other statutory and regulatory requirements.

Criterion (iv) under paragraph (1) implements section 2607A(b)(1) of the LIHEAP statute. Section 2607A(b)(1) states that countable leveraged resources/benefits must "represent a net addition to the total energy resources available to State and federally qualified households in excess of the amount of such resources that could be acquired by such households through the purchase of energy at commonly available household rates." The interim rule's preamble noted that this language could be interpreted to limit countable leveraged resources to energy credits and fuels purchased at discounted prices—to mean, for example, that a grantee could not count leveraged donated funds used to pay low-income households' actual fuel costs at normal rates, because there would be no net addition to the resources these households could acquire at "commonly available household rates," or that a grantee could not count tangible non-fuel items purchased at discounted prices. We did not adopt this narrow interpretation in the interim rule. In criterion (iv) under paragraph (1) in the interim rule, we clarified the statutory language to state that countable leveraged resources and benefits must "represent a net addition to the total home energy resources available to low-income households in excess of the amount of such resources that could be acquired by these households through the purchase of home energy, or the purchase of items that help these households meet the cost of home energy, at commonly available household rates or costs, or that could be obtained with regular LIHEAP allotments provided under section 2602(b) of Public Law 97-35. . . ."

We received one comment on this regulatory provision. The commenter believed that the provision "is consistent with the overall intent" of the statutory leveraging provisions. We retained the same language in the final rule.

### *Changes and recommendation*

Based on our experience in operating the leveraging program, we added a fifth criterion to § 96.87(d)(1) in the final rule, specifying and clarifying that countable resources/benefits must meet the requirements for leveraged resources

and benefits throughout § 96.87 of these regulations and section 2607A of the LIHEAP statute. This is to assure consistent understanding and prevent confusion about the fact that the criteria in § 96.87(d) are not the only requirements for countable leveraged resources/benefits. We also added the word "basic" to the heading for this section—"Basic requirements for leveraged resources and benefits"—to underscore this point.

The third criterion under § 96.87(d)(1) states that countable resources/benefits must be measurable and quantifiable in dollars. We made no change to this criterion in the final rule. However, based on our experience in operating the leveraging program, we encourage grantees to consolidate similar resources in their leveraging reports, so that each counted resource has a gross dollar value of \$200 or more as determined in accordance with § 96.87(g). Several grantees have included in their leveraging reports separate resources valued at only \$10 or \$20.

Disproportionate amounts of time and effort are spent preparing and reviewing information on such small resources. We therefore urge grantees to consolidate similar resources in their leveraging reports, especially resources valued at under \$200, into combined resources valued at \$200 or more. For example, a grantee could combine in-kind donations of space heaters and blankets by different groups and/or individuals, which are separately valued at under \$200, into one resource with a value of \$200 or more. Consolidation of similar resources in the leveraging report is often helpful for larger resources, as well. In almost all cases, grantees will be able to consolidate very small resources into resources valued at \$200 or more.

### *Information on Basic Requirements, Paragraph (2)*

In the interim rule, paragraph (2) of section 96.87(d) listed three additional basic requirements for countable leveraged resources. Countable resources/benefits were required to meet at least one of these three requirements.

Paragraph (2) implements section 2607A(b)(2) of the LIHEAP statute. Section 2607A(b)(2) mandates that leveraged resources/benefits meet at least one of the following three criteria relating to the role of the grantee's LIHEAP program in the development or distribution of the resources/benefits: (1) They "result from the acquisition or development by the State program of quantifiable benefits that are obtained from energy vendors through negotiation, regulation or competitive

bid"; or (2) they "are appropriated or mandated by the State for distribution . . . through the State program"; or (3) they "are appropriated or mandated by the State for distribution . . . under the plan referred to in section 2605(c)(1)(A) to federally qualified low-income households and such benefits are determined by the Secretary to be integrated with the State program."

The first criterion refers to the role of the grantee's LIHEAP program in the acquisition or development of benefits obtained from energy vendors. Based on the discretion in the statute, the interim rule defined the phrase "acquisition or development by the State program" to mean that the grantee's LIHEAP program must have "substantial involvement in the acquisition or development of these benefits. The involvement of the grantee's LIHEAP program" must be "considerable, important, material, and of real value or effect."

The interim rule defined the second criterion to mean that the leveraged resources and benefits must be "provided to low-income households eligible under the grantee's standards, as a part of (through or within) the grantee's LIHEAP program, consistent with the Federal statutes and regulations applicable to the LIHEAP program."

The plan referred to in the third criterion is a part of each grantee's annual application for regular LIHEAP funds; in the plan, the grantee describes how it will carry out statutory assurances to which its chief executive officer has certified and includes other information required by statute. Based on the context in which it appears in the statute, the interim rule defined the phrase, "appropriated or mandated by the State for distribution . . . under the plan . . .", to mean that the leveraged resources and benefits must be "identified and described in the plan and distributed as indicated in the plan; however, they are not provided to low-income households as a part of (through or within) the grantee's LIHEAP program."

The third statutory criterion also requires that the leveraged benefits be "integrated with the State program." The interim rule defined this to mean that the benefits must be "coordinated with the grantee's LIHEAP program and . . . provided in cooperation and in conjunction with the LIHEAP program."

We received ten letters that commented on one or more of these three criteria.

#### *Comment and Response*

A commenter recommended "that the rules applying" to criteria (i) and (ii) "simply restate the language of the law." The commenter said that HHS implemented an "expanded interpretation" of these criteria that "is unnecessary and inconsistent with the nature of a block grant."

Much of the language of the LIHEAP statute—including section 2607A—is subject to differing interpretations. As we stated earlier in this preamble, the leveraging incentive program is different from the regular LIHEAP block grant, where different grantees may adopt different interpretations of a statutory provision, as long as the interpretations are not clearly erroneous. In the regular LIHEAP program, one grantee's statutory interpretations and program operations generally do not depend on or affect another's. In the leveraging program, however, where grantees are "competing" for shares of the same limited amount of leveraging incentive funds, we need to apply common rules to all proposed resources, and all concerned parties should have common understandings about leveraged resources that are countable, and resources that are not. This is why we do not "simply restate that language of the law" in cases where conflicting interpretations of provisions in section 2607A are likely.

#### *Comments and Response*

We received several verbal comments about the meaning of the statutory phrase, "the State program," in criterion (i). The same phrase is used in the statute with respect to criteria (ii) and (iii), where it clearly means the grantee's LIHEAP program, and not another State agency or program. We believe it is logical and appropriate to conclude that it has the same meaning in criterion (i). Through these three criteria, the statute and regulations require that the grantee's LIHEAP program have a clear, substantive role in developing, acquiring, administering, and/or coordinating with leveraged resources countable under the LIHEAP leveraging incentive program.

A commenter said that the requirement in criterion (i) that the grantee's LIHEAP program have "substantial involvement" which is "considerable, important, material, and of real value or effect" in acquisition or development of benefits "is both overly restrictive and subject to subjective interpretation." We do not believe it is overly restrictive to require that the grantee's LIHEAP program play an active role in acquiring or developing a

resource under this criterion. The statute requires that, in order to meet the criterion, the benefits must "result from the acquisition or development by the State program of quantifiable benefits that are obtained from energy vendors through negotiation, regulation or competitive bid." We do not believe that this language should be understood to require the grantee's LIHEAP program to acquire or develop the benefits entirely by itself. On the other hand, in cases where other entities also were involved in the acquisition or development, the grantee's LIHEAP program should have a substantive role. If, for example, grantee LIHEAP staff had simply attended a meeting at which other people negotiated reduced home energy rates for low-income households, that attendance alone should not count as meeting criterion (i). The interim rule therefore required that the grantee's LIHEAP program have "substantial involvement," and the final rule requires that the actions/efforts of grantee LIHEAP program staff be "substantial and significant" in obtaining a resource from a vendor.

The same commenter believed that the statutory requirement for criterion (i) is met as long as "the source of leveraged funds are [sic] energy vendors and the funds resulted from negotiation, regulation, or competitive bidding," and the benefits "go to \* \* \* the state program." We do not believe that a resource countable under criterion (i) must "go to" (be administered through or within) the LIHEAP program. Resources leveraged under this criterion are often discounts or waivers for low-income households, not "funds" that can be administered through the LIHEAP program. We believe that reduced home energy rates and waivers of certain home energy charges that are negotiated with home energy vendors by (or with substantive participation of) LIHEAP program staff should be countable under this criterion—even though reduced rates and waivers usually are not administered through the LIHEAP program.

This commenter apparently assumed that "development by the State program" means that the State program must be involved in developing "a method of acquiring" the resources, but that "acquisition \* \* \* by the State program" means only that the benefits must "go to" the program. However, we continue to believe that the grantee's LIHEAP program—at the central, regional, and/or local office level—should play an active, substantial role in acquiring (obtaining) or developing the resource from the home energy vendor, not simply passively "acquire" (receive)

a benefit in whose acquisition it played no part. (Such a resource could be countable under criterion (ii), if the resource is "appropriated or mandated" by the State, tribe, or territory for distribution through the LIHEAP program.) Benefits from vendors that are negotiated by or result from competitive bidding conducted by (or with substantive participation of) subrecipients (e.g., local administering entities) under a State, tribal, or territorial LIHEAP program acting in that capacity, also are countable under criterion (i) as long as all other requirements also are met.

We agree that the interim rule's requirement that the involvement of the grantee's LIHEAP program in the acquisition or development of the resource be "substantial" and "considerable, important, material, and of real value or effect" in some cases may be confusing and subject to subjective interpretation. In grantees' leveraging reports on FY 1991 and FY 1992 leveraging, most resources claimed under criterion (i) clearly met this test, and several clearly did not. However, there also were a number of claimed resources for which we had to request additional information from the grantee to substantiate "substantial" involvement, and on several of these we still had to make difficult judgments about whether to count the resource. Short of requiring that the grantee LIHEAP program acquire or develop the resource completely on its own, or saying that the grantee program need have no role at all in acquiring or developing the resource—which we do not believe to be appropriate—we see no way to write regulatory language that would totally eliminate such situations.

We also have found that several grantees were confused about whether criterion (i) applied only to resources obtained from energy vendors. The statute clearly limits this criterion to resources/benefits "that are obtained from energy vendors through negotiation, regulation, or competitive bid," not from charitable organizations, etc.

To clarify criterion (i) without materially changing its substance, we amended § 96.87(d)(2)(i) as follows in the final rule:

"The grantee's LIHEAP program had an active, substantive role in developing and/or acquiring the resource/benefits from home energy vendor(s) through negotiation, regulation, and/or competitive bid. The actions or efforts of one or more staff of the grantee's LIHEAP program—at the central and/or local level—and/or one or more staff of LIHEAP program subrecipient(s) acting

in that capacity, were substantial and significant in obtaining the resource/benefits from the vendor(s)."

#### *Comments and Response*

There have been several questions about the statutory requirement that resources countable under criterion (ii) be distributed "through" the grantee's (LIHEAP) program. The interim rule and this final rule state that this means "within" and "as a part of" the grantee's LIHEAP program. Under criterion (ii), the leveraged resource/benefit is administered by the LIHEAP agency or agencies under the LIHEAP statute and regulations, consistent with the eligibility standards and benefit levels used by the grantee for its Federal LIHEAP funds; it is considered a LIHEAP benefit. Resources counted under criterion (ii) do not have to be specifically identified in the grantee's LIHEAP plan if they are clearly covered by the plan. For example, the plan would not have to say that leveraged cash resources are used to provide heating assistance, as long as the plan describes a heating assistance program that is funded with LIHEAP resources and the leveraged resources are used in accordance with this description.

Five letters addressed the statutory and regulatory requirements that resources countable under criteria (ii) and (iii) must be "appropriated or mandated" by the grantee "for distribution" through the grantee's LIHEAP program (criterion (ii)) or under the grantee's LIHEAP plan and integrated with the LIHEAP program (criterion (iii)).

Using similar language, two Congressional letters said the regulation should "make clear" that leveraging initiatives that qualify for incentive funds because they are "mandated" by State action must be created by legislation, rule, contract, binding agreement, or another specific action or identifiable "mandate" or requirement—the grantee cannot merely list voluntary charitable efforts in its LIHEAP plan in order to meet these criteria. Two other commenters said that the interim rule was not sufficiently clear regarding the requirements for "mandated" resources. One of these commenters said that "merely mentioning a program in the state's plan do not constitute a mandate"; a mandate "should be a regulation, order, or other formal agreement or expression by the state agency governing the control and the distribution of the leveraged resource."

We agree that a mere list of voluntary charitable efforts in a grantee's LIHEAP plan does not meet these two criteria.

Resources/benefits that are mentioned in the plan, but are neither provided through nor integrated with the LIHEAP program, are not countable under these criteria.

We do not believe that the statute or legislative history require that resources countable under these criteria be "created" by State, tribal, or territorial "mandate," however. We therefore did not make a change in response to comments supporting such a requirement. The statute requires instead that the resource/benefits be "appropriated or mandated by the State [or tribal or territorial grantee] for distribution" through its LIHEAP program (criterion (ii)) or under its LIHEAP plan and also integrated with its LIHEAP program (criterion (iii)). For example, oil overcharge funds counted under criterion (ii) would not be created by State mandate; they would be mandated by the State for distribution through its LIHEAP program.

We believe that "by the State" means that the State, tribe, tribal organization, or territory—the grantee—must appropriate or mandate the resource/benefits for distribution. A subrecipient such as a local nonprofit agency might actually "distribute" the resource/benefits on behalf of the grantee, but the grantee must take the action that meets the requirement to appropriate or mandate the resource/benefits for distribution through its LIHEAP program or under its LIHEAP plan, etc.

The grantee's LIHEAP application—which includes the plan—is an official, formal document in which the grantee makes a binding commitment to distribute resources in certain ways. We therefore believe that it is reasonable to assume that the inclusion of the leveraged resource/benefits in the LIHEAP plan means that the grantee has "mandated" the resource for distribution as described in the plan. Inclusion of appropriate information in the plan is documentation of the mandate. Because the grantee's LIHEAP plan is a formal expression by the grantee that governs the distribution of the leveraged resource, we consider resources appropriately described in or covered by the plan to be mandated by the grantee for distribution as required by criteria (ii) and (iii).

Another commenter believed that criterion (ii) "can reasonably be read to require that some state entity (in the Executive, Legislative or Judicial branch) provide the additional resources to the State program for distribution by the program, that is, they were appropriated or mandated by the Governor or legislature or by the judiciary \* \* \*." On the other hand,

this commenter said that criterion (iii) "is somewhat of a 'catchall' for independently initiated activities, so long as they are then 'integrated with' the state program. The advantage of this approach is that the program does not have to assure that it is aware of every instance when a CAP negotiates an arrearage forgiveness or a waived fee for a LIHEAP client in time to amend its state plan to include such activity." This commenter believed that resources under this criterion "may clearly be available independently of state activity."

However, the statute requires that resources countable under both criterion (ii) and criterion (iii) be "appropriated or mandated by the State for distribution." We therefore do not believe it is appropriate to conclude that criterion (ii) requires that a State entity provide the resource for distribution by the LIHEAP program, but that under criterion (iii), the resource may be available independent of State activity. Also, criterion (iii) requires that the resource/benefits be integrated with the grantee's LIHEAP program, and we do not believe that a resource can be both integrated with the LIHEAP program and "available independently of State activity."

We agree that "independently initiated" resources/benefits that are appropriated or mandated by the grantee for distribution in a way that is integrated with the LIHEAP program can be countable under criterion (iii) as long as all other relevant statutory and regulatory requirements are met. However, we believe that, in order to be distributed under the grantee's LIHEAP plan—as required by the statute for criterion (iii)—the resource/benefits must be identified and described in the plan. Also, because the statute requires that resources countable under criterion (iii) be "appropriated or mandated by the State for distribution" under the LIHEAP plan and "integrated" with the LIHEAP program, we believe that the grantee needs to be aware of these resources. The grantee cannot legitimately claim that it appropriated or mandated a resource and the resource was integrated with the LIHEAP program—but the grantee did not know about or document the resource during the base period in which the benefits were provided to recipients. The identification and description of the resource/benefits in the plan provides formal documentation of the mandate by the grantee that the resource/benefits be distributed "under the plan" and "integrated" with the LIHEAP program. We therefore continue to require that resources to be counted under criterion

(iii) must be included in the grantee's plan.

The preamble to the interim rule required (at 57 FR 1967) that the resource be included in the plan during the base period for which the resource is claimed—the period in which the resource/benefits are provided to low-income households. For clarity, we added this requirement to the final rule itself. As we stated in the interim rule's preamble, grantees that did not identify and describe all of their leveraging activities for a base period in their initial plans covering this period may amend their plans to include such resources at any time (before or) during the base period, but they may not amend their plans to include such resources retroactively, after the base period has ended. For clarity, the final rule requires that any LIHEAP plan amendments needed to cover leveraging activities counted under criteria (ii) and (iii) of section 96.87(d)(2) must be submitted before the end of the base period. Resources/benefits provided under the criterion (ii) must be distributed consistent with the grantee's LIHEAP plan and program policies that were in effect during the base period. The plan must identify and describe resources/benefits provided under criterion (iii) before the base period ends.

In addition, the final rule reiterates the requirement in the interim rule that the plan identify and describe the resources/benefits to be counted under criterion (iii), and now also requires that the plan identify and describe their sources, and the way in which they are integrated/coordinated with the grantee's LIHEAP program. We added the latter requirements because several grantees' plan "descriptions" of leveraged resources were so vague (e.g., "donations") that they were virtually meaningless. Each individual resource does not necessarily need to be separately identified; similar resources may be grouped together. For example, similar donations from a number of churches might be covered as follows in the plan: "In-kind contributions by approximately five churches, of blankets, space heaters, and fans that will be distributed by these churches to low-income households referred by the LIHEAP program because the households' LIHEAP benefits do not meet their need for these items." (Such related donations also could be combined as one resource in the grantee's LIHEAP leveraging report.)

There have been several questions and comments about the statutory requirement that resources countable under criterion (iii) must be "integrated

with the State program." A commenter said that "integration" should be defined "to clearly require a higher form of relationship than merely serving the same income-class of households. An integrated program should have coordinated administrative procedures, cooperative targeting of benefits and benefit levels, and an integrated set of aims and purposes that rely on LIHEAP as the keystone to fulfilling those common purposes." Another said that "[t]here must be a direct connection [with the LIHEAP program] through a set of mutual, explicit obligations and formalized arrangements."

The statutory requirement that resources counted under criterion (iii) be "integrated" with the grantee's LIHEAP program has been difficult for HHS and grantees to implement. In the interim rule, criterion (iii) required that resources/benefits be "integrated" and "coordinated" with the grantee's LIHEAP program, and "provided in cooperation and in conjunction" with the LIHEAP program. A number of grantees were confused about what constituted integration and coordination. In practice, these terms were not sufficiently clear or measurable, and they were subject to differing understandings and interpretations. We needed a more objective way to determine whether a resource was integrated with the LIHEAP program.

We therefore added eight "conditions" ("A" through "H") in the final rule, describing specific circumstances that demonstrate that a resource is integrated with the grantee's LIHEAP program—that the resource and LIHEAP function cooperatively and in coordination with each other to provide an interrelated larger unit or whole. If a leveraged resource meets at least one of these eight conditions, we will consider it to be integrated and coordinated with the grantee's LIHEAP program.

Based on the comments we received and on our experience in the first three cycles of the leveraging program, we clarified requirements for criteria (ii) and (iii) of § 96.87(d)(2) in the final rule. We amended criterion (ii) as follows:

The grantee appropriated or mandated the resource/benefits for distribution to low-income households through (that is, within and as a part of) its LIHEAP program. The resource/benefits are provided through the grantee's LIHEAP program to low-income households eligible under the grantee's LIHEAP standards, in accordance with the LIHEAP statute and regulations and consistent with the grantee's LIHEAP plan and program policies that were in effect during the base period, as if they

were provided from the grantee's Federal LIHEAP allotment.

We amended criterion (iii) as follows: The grantee appropriated or mandated the resource/benefits for distribution to low-income households as described in its LIHEAP plan \* \* \*. The resource/benefits are provided to low-income households as a supplement and/or alternative to the grantee's LIHEAP program, outside (that is, not through, within, or as a part of) the LIHEAP program. The resource/benefits are integrated and coordinated with the grantee's LIHEAP program. Before the end of the base period, the plan identifies and describes the resource/benefits, their source(s), and their integration/coordination with the LIHEAP program.

The Department will determine resources/benefits to be integrated and coordinated with the LIHEAP program if they meet at least one of the following eight conditions. If a resource meets at least one of conditions A through F when the grantee's LIHEAP program is operating (and meets all other applicable requirements), the resource also is countable when the LIHEAP program is not operating.

(A) For all households served by the resource, the assistance provided by the resource depends on and is determined by the assistance provided to these households by the grantee's LIHEAP program in the base period. The resource supplements LIHEAP assistance that was not sufficient to meet households' home energy needs, and the type and amount of assistance provided by the resource is directly affected by the LIHEAP assistance received by the households.

(B) Receipt of LIHEAP assistance in the base period is necessary to receive assistance from the resource. The resource serves only households that received LIHEAP assistance in the base period.

(C) Ineligibility for the grantee's LIHEAP program, or denial of LIHEAP assistance in the base period because of unavailability of LIHEAP funds, is necessary to receive assistance from the resource.

(D) For discounts and waivers: Eligibility for and/or receipt of assistance under the grantee's LIHEAP program in the base period, and/or eligibility under the Federal standards set by section 2605(b)(2) of Public Law 97-35 \* \* \* is necessary to receive the discount or waiver.

(E) During the period when the grantee's LIHEAP program is operating, staff of the grantee's LIHEAP program and/or staff assigned to the LIHEAP program by a local LIHEAP

administering agency or agencies, and staff assigned to the resource communicate orally and/or in writing about how to meet the energy needs of specific, individual households. For the duration of the LIHEAP program, this communication takes place before assistance is provided to each household to be served by the resource, unless the applicant for assistance from the resource presents documentation of LIHEAP eligibility and/or the amount of LIHEAP assistance received or to be received.

(F) A written agreement between the grantee's LIHEAP program or local LIHEAP administering agency, and the agency administering the resource, specifies the following about the resource: eligibility criteria; benefit levels; period of operation; how the LIHEAP program and the resource are integrated/coordinated; and relationship between LIHEAP eligibility and/or benefit levels, and eligibility and/or benefit levels for the resource. The agreement provides for annual or more frequent reports to be provided to the LIHEAP program by the agency administering the resource.

(G) The resource accepts referrals from the grantee's LIHEAP program, and as long as the resource has benefits available, it provides assistance to all households that are referred by the LIHEAP program and that meet the resource's eligibility requirements. Under this condition, only the benefits provided to households referred by the LIHEAP program are countable.

(H) Before the grantee's LIHEAP heating, cooling, crisis, and/or weatherization assistance component(s) open and/or after the grantee's LIHEAP heating, cooling, crisis, and/or weatherization assistance component(s) close for the season or for the fiscal year, or before the entire LIHEAP program opens and/or after the entire LIHEAP program closes for the season or for the fiscal year, the resource is made available specifically to fill the gap caused by the absence of the LIHEAP component(s) or program. The resource is not available while the LIHEAP component(s) or program is operating.

#### *Additional Information*

In order to be countable, a leveraged resource must meet the requirements under at least one of criteria (i), (ii), and (iii). A single resource cannot meet both criterion (ii) and criterion (iii), because a resource cannot be provided to low-income households both as a part of the LIHEAP program (criterion (ii)), and not as a part of, but integrated with, the LIHEAP program (criterion (iii)). A resource countable under criterion (iii)

must meet all of the requirements in the first part of the criterion, and at least one of the conditions demonstrating integration/coordination in the second part of the criterion.

In criterion (iii), conditions A through F describe acceptable circumstances of integration/coordination while the grantee's LIHEAP program is operating. If a resource meets at least one of these six conditions while the grantee's LIHEAP program is operating (as well as all other applicable requirements), the resource also is countable during the base period when the LIHEAP program is not operating. The circumstances described in a condition must apply to all assistance provided by the resource, and all households assisted by the resource, except for condition G. Condition G describes certain resources that accept referrals from the grantee's LIHEAP program. It is possible that some of the households served by a resource will not be referred to it by the LIHEAP program. Under condition G, benefits provided by certain resources to households that were referred by the LIHEAP program are countable, but benefits provided to households that were not referred by the LIHEAP program are not countable. Condition H describes certain resources made available specifically because the grantee's entire LIHEAP program has not yet opened or has closed, or because one or more components of the LIHEAP program have not yet opened or have closed.

If a grantee sets its LIHEAP income eligibility standard below the LIHEAP statute's maximum (for example, at 125 percent of the poverty level), it could count leveraged benefits provided to households with incomes between the State standard and the Federal maximum standard (the greater of 150 percent of the poverty level or 60 percent of State median income) under criterion (i) or criterion (iii), as long as the benefits meet all other requirements for leveraged resources as well. These criteria allow the counting of leveraged benefits that are provided to households with incomes up to the Federal maximum and to categorically eligible households, as described in section 2605(b)(2) of the LIHEAP statute, whether or not the grantee's LIHEAP program has more restrictive eligibility standards. Under criterion (ii), leveraged benefits must be provided through the grantee's LIHEAP program, to households eligible under the grantee's standards.

### *Countable Leveraged Resources and Benefits*

Section 96.87(e) of the interim rule and the final rule describes resources and benefits that are countable under the LIHEAP leveraging incentive program. This section describes the three types of countable resources—certain cash resources, home energy discounts and waivers, and third-party in-kind contributions—and lists examples of countable resources/benefits under each. Countable resources/benefits are not limited to the examples named. Additional resources may be countable as well, provided that they also meet all applicable requirements.

Under both the interim rule and the final rule, we do not require that leveraging activities be “new” in the base period in order to be countable. Benefits provided by ongoing leveraging activities—such as discounts in home energy bills and home energy assistance provided by fuel funds—are countable as long as they meet the requirements of the statute and these regulations, and the counted benefits are provided to federally or State eligible low-income households during the base period.

There is sometimes a distinction or difference between a resource as it was acquired, and the benefits that the resource provided to low-income households. Resources acquired in the form of cash can be used to provide benefits in the form of certain cash payments, tangible items, and/or services. However, when resources are acquired in the form of discounts/waivers and in-kind contributions, the benefits are essentially the same as the resources.

The interim rule listed the three types of countable leveraged resources as “cash resources,” “home energy discounts and credits,” and “third-party in-kind contributions.” Because the word “credits” has more than one common meaning, we found that its use was confusing on occasion. In some cases, a “credit” refers to and means a discount. For example, a “credit” donated by a home energy vendor toward the purchase of fuel from the vendor—with no payment received for this amount—represents a discount/reduction in the price of the fuel and should be classified as a discount. In other cases, however, a “credit” to a household’s home energy account results from a payment on behalf of the household and therefore refers to the benefit provided by a cash resource. For example, a grantee’s own funds used to provide heating assistance benefits should be considered a cash resource.

However, in its leveraging report, a grantee mistakenly categorized these funds under “discount/credit” because the benefits represented “credits” toward the recipients’ accounts with their vendors. To reduce confusion, therefore, this final rule refers to “home energy discounts and waivers,” rather than “home energy discounts and credits” as used in the interim rule. In cases where a grantee has difficulty determining whether to classify a “credit” as a cash resource or a discount/waiver, we will discuss the resource with the grantee to determine the correct classification.

### *Comment and Response*

We received one comment on resources listed as countable in § 96.87(e) of the interim rule. The commenter questioned whether forgiveness of utility sales taxes for LIHEAP-eligible households should be countable.

The interim rule listed as a countable resource/benefit “partial or full forgiveness of home energy bill arrearages”; the arrearage amounts could include sales taxes and/or other extra charges, such as special energy taxes, environmental surcharges, and late payment charges. As long as such charges are included in the low-income household’s home energy bill and apply to all residential customers in comparable situations, we do not believe that they should be excluded. Use of leveraged funds to pay low-income households’ home energy bills, or portions of these bills, that include such charges would be countable as well. We retained this provision in the final rule.

### *Comments and Changes*

The final rule specifies that purchase and donation of space heating and space cooling devices, equipment, and systems are countable. Purchase and donation of space heating and space cooling devices and equipment, such as furnaces, fans, and air conditioners, already were specified as countable in the interim rule. Based on our experience in operating the leveraging program, we found that the term “devices and equipment” was too limited. Therefore, we added the broader term “systems” in the final rule. For clarity, the final rule also specifies additional countable weatherization services: Replacement and repair of weatherization materials (installation of weatherization materials already was specified as countable); installation, replacement, and repair of space heating and space cooling devices, equipment, and systems (for example, installation of

energy efficient furnaces and repair of leaks in heating system ducts); and installation, replacement, and repair of other tangible items that help low-income households meet the costs of home energy and that are specifically approved by HHS. Also, for clarity and in response to comments urging that they be countable, the final rule adds the following services when they are an integral part of weatherization to help low-income households meet the costs of home energy: Installation, replacement, and repair of windows, exterior doors, roofs, exterior walls, and exterior floors; pre-weatherization home energy audits of homes that were weatherized as a result of these audits; and post-weatherization inspection of homes. Also, we agree with the informal comments we received recommending that several safety-related aspects of weatherization be countable when they are integral and necessary parts of weatherization. In response to these comments, the final rule adds: Installation, replacement, and repair of smoke/fire alarms that are an integral part, and necessary for safe operation, of a home heating or cooling system installed or repaired as a weatherization activity; and asbestos removal that is an integral part of and necessary to carry out weatherization to help low-income households meet the costs of home energy. These services are countable if they are paid for with leveraged cash resources, or provided as in-kind contributions by volunteers or donated paid staff under the conditions specified in the final rule. Discounts in the cost of these items and services also are countable under the conditions specified in the final rule.

A commenter recommended that weatherization “audits” and inspections be countable, because they are essential to the success of weatherization and “ensure the net addition of energy resources to the household.” We adopted this recommendation, with respect to home energy audits to determine households’ weatherization needs, and inspections to assure that weatherization has been properly carried out, when these audits and inspections are integral parts of weatherization to help low-income households meet the costs of home energy. Only the home energy audits of low-income households’ homes that were weatherized as a result of these audits are countable.

Because these countable services involving smoke/fire alarms, asbestos removal, pre-weatherization audits, and post-weatherization inspections must be an integral part of weatherization carried out to help specific low-income

households meet the costs of home energy, they generally should be counted in the base period in which these households' homes were weatherized. Pre-weatherization audits—which are countable as an integral part of resulting weatherization—should be counted in the base period in which the weatherization is carried out. This will prevent counting the audits of homes when the follow-up weatherization was not done. However, homes might be weatherized using leveraged funds or volunteer services in one base period and therefore counted in that base period, but the post-weatherization inspections of these homes might take place and be counted in the following base period.

Also, based on our experience in operating the leveraging incentive program, we added a clarification to the final rule at § 96.87(e)(1)(i), naming several specific examples of countable benefits provided by leveraged cash resources: Heating, cooling, and energy crisis assistance payments and cash benefits made in the base period to or on behalf of low-income households toward their home energy costs—including home energy bills, taxes on home energy sales/purchases and services, connection and reconnection fees, application fees, late payment charges, bulk fuel tank rental or purchase costs, and security deposits that are retained for six months or longer.

Also as a clarification, we added language at the beginning of paragraph (2) of § 96.87(e), which describes countable home energy discounts and waivers, stating that countable discounts/waivers must “pertain to generally applicable prices, rates, fees, charges, costs, and/or requirements.” This language applies to all of the subparagraphs under this paragraph. We therefore deleted similar language from subparagraph (ii).

Finally, we added clarifying language specifying that the following are countable: Partial or full waivers of bulk fuel tank rental or purchase costs; and reductions in, and partial or full waivers of, non-Federal taxes on home energy sales/purchases and services (such as furnace repairs) and of other non-Federal taxes provided as tax “credits” to low-income households to offset their home energy costs, unless Federal funds or Federal tax “credits” provide payment or reimbursement of these costs.

As long as a fuel is used wholly or partly for home energy by the low-income recipient household, the full amount of leveraged heating, cooling,

and crisis assistance benefits for the fuel, and the full amount of leveraged discounts and waivers (including arrearage forgiveness) relating to the fuel, are countable, even if they may exceed the home energy portion of the household's bill. It is often difficult or impossible to determine the exact portion of a household's fuel bill that covers home energy—that is, home heating and cooling rather than other residential uses. Also, it is often necessary to pay a household's entire fuel bill—not just the heating and cooling portion—to prevent service shut-off or termination.

Tangible items that are installed or repaired using leveraged services must be items that would be countable if they were leveraged, or must be specifically approved by HHS upon request by the grantee. (For example, donated services to install a washing machine would not be countable, because this appliance, even if it was purchased with non-Federal funds or donated, would not be countable.) However, these items themselves do not have to be leveraged resources. Only the leveraged resource/benefit (for example, leveraged cash used to pay for installation of non-leveraged insulation) is countable in such cases.

We deleted as separate countable resources all services involving delivery and transportation—that is, delivery of fuel, weatherization materials, and other items. We also deleted purchase, rental, donation, and loan of supplies and equipment used to deliver these things and used to install weatherization materials. Therefore, cash resources used to pay for these services and items, discounts in their cost, and in-kind contributions of these services and items are no longer countable as separate resources. (Although delivery services are no longer separately countable, delivery costs sometimes are included in the fair market price of delivered bulk fuel—such as fuel oil, propane, coal, and wood—and as part of the purchase and/or installation costs of weatherization materials and space heating and space cooling devices, equipment, and systems.)

We deleted delivery services, and supplies and equipment used for delivery and installation services, for several reasons, based on our experience with the leveraging program. These services often are not actually direct benefits to specific low-income households. Valuation was a problem. The value of equipment such as trucks that would be used for a number of years and by a number of different users might have been pro-rated for the items' expected useful life and anticipated

other users. However, it would be virtually impossible to get consistent estimates of, and pro-rating for, the useful life of equipment, and accurate pro-rating for other users, even if we issued extensive regulatory instructions. If the entire value of expensive equipment that was to be used over a period of years was counted for only one base period, this would inflate the resource's effect for that base period—and still leave the question of how to account for other users. We also found that several grantees' leveraging reports tried to stretch countable delivery-related services and items beyond the letter and intent of the interim rule—for example, to count a “discount” in the cost of gasoline used in a vehicle that transported fuel oil. Finally, the amount of effort necessary to estimate and document valuation, and to review these calculations and documentation, is disproportionate for such marginal resources.

#### *Comments and Response*

Since the end of the comment period on the interim rule, questions have arisen about whether certain types of borrowed funds are countable under the leveraging incentive program. The interim rule said that borrowed funds were not countable. The interim rule's preamble indicated that borrowed funds were not countable because they must be repaid, and therefore there is no net addition to households' home energy resources. This is the case if a low-income household borrows funds, uses these funds to pay a home energy bill or weatherize its home, etc., and then repays the loan with its own funds. It is also the case if, for example, a grantee borrows funds, uses these funds to pay home energy bills or weatherize homes, etc., and then repays the loan with Federal LIHEAP funds.

In general, benefits or services paid for with borrowed funds and interest on those funds are not countable under the leveraging incentive program. We clarified in the final rule that this prohibition also applies to loans made to low-income households to help them pay their home energy costs, including weatherization, and to loans made by low-income households.

However, we now recognize that borrowed or repaid funds from certain revolving loan funds and similar loan arrangements can be countable. We revised the final rule accordingly, at §§ 96.87(b)(3) and 96.87(f)(2). The final rule defines “countable loan fund” in § 96.87(b)(3) as follows:

*Countable loan fund* means revolving loan funds and similar loan instruments in which:

(i) The sources of both the loaned and the repaid funds meet the requirements of this section, including the prohibitions of paragraphs (f)(1), (f)(2), and (f)(3);

(ii) Neither the loaned nor the repaid funds are Federal funds or payments from low-income households, and the loans are not made to low-income households; and

(iii) The benefits provided by the loaned funds meet the requirements of this section for countable leveraged resources and benefits.

In this definition, "payments from low-income households" do not include normal rent payments. Any interest paid on funds borrowed from a revolving loan fund would not be countable when paid to the fund, but could be countable when borrowed later and used for countable benefits.

An example of a countable loan fund is a resource in which a State used oil overcharge funds in its LIHEAP program to establish a revolving loan fund for landlords to install weatherization materials for low-income households. The funds are used by landlords to provide weatherization that helps the households reduce their home energy needs, with a requirement that the landlords repay the loans to the State. Repaid funds are then used to make loans to landlords for additional weatherization. This has the result of increasing the amount of weatherization carried out, with non-Federal funds and without putting any burden on low-income households. The resources are countable in the base period in which the weatherization takes place. When repaid funds are used again, the additional weatherization is countable in the base period in which it is provided. Such activities are countable if neither Federal funds nor payments from low-income households are used for the loans or to repay the loans, charges to the households (including rent) are neither increased nor imposed as a result, and all other statutory and regulatory requirements are met.

Also, as long as all requirements of § 96.87 for countable leveraged resources and benefits are met, if a grantee or other entity borrows funds (commercially or otherwise, consistent with all applicable laws and regulations), uses these funds to provide benefits that would otherwise be countable, and repays the loan with countable non-Federal funds in the base period in which the benefits were provided, the benefits are countable based on the countable non-Federal character of the repaid funds and the benefits' net addition to low-income households' home energy resources.

#### *Comments and Response*

We made several changes in the final rule involving countable petroleum violation escrow (PVE or oil overcharge) funds. Oil overcharge funds result from settlements of cases of overcharges which violated petroleum price controls in effect from 1973 to 1981, under the Emergency Petroleum Allocation Act of 1973. Since 1981, over \$4.5 billion in oil overcharge funds have been distributed by the Department of Energy (DOE) to the 50 States, the District of Columbia, and most U.S. territories; additional oil overcharge funds are expected to be distributed in the future. LIHEAP is one of the programs under which most of these funds can be used.

Senate Report 101-421 on the 1990 LIHEAP reauthorization law states that the Senate Committee on Labor and Human Resources

believes there are very limited circumstances under which Petroleum Violation Escrow Funds should be considered as leveraged resources. Therefore, if the Secretary chooses to count Petroleum Violation Escrow Funds as leveraged resources, he or she may only count funds that are distributed after October 1, 1990, and that were not previously required to be allocated to low-income households.

In the interim final rule, we defined "countable petroleum violation escrow funds" in section 96.87(b) as "petroleum violation escrow (oil overcharge) funds that were distributed to a State or territory after October 1, 1990, were added to and used as a part of the State or territory's LIHEAP program, and were not previously required to be allocated to low-income households." We said in the interim rule's preamble that oil overcharge funds "may be counted under the LIHEAP leveraging incentive program only by the 50 States, the District of Columbia, and the territories to which they were distributed directly \* \* \*." Three States commented on the interim rule's treatment of oil overcharge funds.

Two of these States disagreed with the interim rule's requirement that only PVE funds distributed to States and territories after October 1, 1990, are countable. One of the two States believed that countability of PVE funds should depend on the date a State or territory added them to its LIHEAP program. The second State believed that all PVE funds added to and used as part of a State's LIHEAP program during a base period should be countable.

We do not agree with these comments. We believe that it is consistent with the Senate Report to provide that oil overcharge funds distributed to States and territories by

DOE on or before October 1, 1990, cannot be counted under the leveraging program. Also, we believe that it would be unfair to count remaining oil overcharge funds that were distributed to States and territories by DOE before the LIHEAP leveraging incentive program was established—before grantees knew that they might receive leveraging incentive funds if they used oil overcharge funds in certain ways. This would unfairly penalize grantees that used these funds in a timely way, soon after receiving them—as the terms of distribution encouraged them to do. It would unfairly reward grantees that did not use these funds in a timely way. We therefore retained and clarified the requirement that only PVE funds that were distributed to a State or territory by DOE after October 1, 1990 (and used consistent with all other relevant regulatory and statutory requirements) are countable.

In correspondence relating to its leveraging report on FY 1991 leveraging activities, a third State argued that oil overcharge funds it used for home energy, but not under LIHEAP, should be countable. Under the interim final rule, these funds were not countable because they were not "added to and used as a part of" the State's LIHEAP program. However, after further reflection, we agree that PVE funds that are used under other programs to provide home energy to low-income households should be countable as long as they meet the requirements under section 96.87. Therefore, this final rule changes the definition of countable petroleum violation escrow funds in section 96.87(b)(4) to state, in part, that they must be

\* \* \* used to assist low-income households to meet the costs of home energy through (that is, within and as a part of) a State or territory's LIHEAP program, another Federal program, or a non-Federal program, in accordance with a submission for use of these petroleum violation escrow funds that was approved by DOE \* \* \*.

Because the LIHEAP statute limits the percent of LIHEAP funds that can be used for weatherization, a grantee that wanted to use large amounts of PVE funds for weatherization would use them under DOE's low-income weatherization assistance program or under a non-Federal weatherization program that meets the requirements for use of PVE funds. With this change in the regulations, these PVE funds could be countable under the LIHEAP leveraging incentive program as long as they meet all applicable requirements for countable leveraged resources.

The final rule also specifies the requirements under § 96.87(d)—"Basic

requirements for leveraged resources and benefits”—that countable PVE funds must meet: all of the criteria under paragraph (d)(1), as well as criterion (ii) or criterion (iii) under paragraph (d)(2). Paragraph (d)(1) includes the requirement that countable leveraged resources meet the requirements in the leveraging incentive program section of the final rule. This clarifies that, for example, like other countable leveraged resources, countable PVE funds cannot be used as matching or cost sharing for any Federal program—such as emergency assistance under title IV of the Social Security Act—and they cannot be counted for any other Federal leveraging incentive program. This clarification is based on our experience in operating the leveraging incentive program and is intended to prevent misunderstanding.

Because the grantee's LIHEAP program does not have an active, substantive role in developing or acquiring PVE funds from home energy vendors through negotiation, regulation, or competitive bid, PVE funds cannot be counted under criterion (i) under paragraph (d)(2). Countable PVE funds added to and used as a part of the grantee's LIHEAP program would be counted under criterion (ii) of paragraph (d)(2). Countable PVE funds used under another program would be counted under criterion (iii); therefore, grantees that want to count such funds must be sure to meet the requirements of criterion (iii) for inclusion in the LIHEAP plan and integration with the LIHEAP program.

In its comments on the interim rule, a State urged HHS to allow tribes to count oil overcharge funds under some circumstances; several tribal grantees have verbally agreed with that comment. Upon further consideration, we agree that there are certain circumstances under which tribes should be able to count oil overcharge funds. We describe those circumstances later in this preamble, under “Leveraging Issues Relating to Tribal Grantees.”

Finally, we changed the definition of countable petroleum violation escrow funds at § 96.87(b)(4) in the final rule to include interest earned on PVE funds distributed to a State or territory by DOE after October 1, 1990 (as long as all other applicable statutory and regulatory requirements also are met). Interest earned on PVE funds generally is treated like the PVE funds themselves; this change clarifies that this practice is acceptable in the leveraging program.

#### *Resources and Benefits That Cannot Be Counted*

Section 96.87(f) of the interim rule and the final rule describes resources and benefits that are not countable under the LIHEAP leveraging incentive program. Thirteen of the letters we received included comments on this section.

#### *Comment and Response*

A commenter proposed that low-income households' co-payments for home energy be countable as leveraged funds. Similarly, in its leveraging report on FY 1991 leveraging, a grantee proposed to count the services of a householder who installed weatherization materials in his own home. We cannot count such payments and services under the leveraging incentive program. In the first instance, the household would simply be helping to pay its own bill. In both cases, these are the households' own “contributions,” not leveraged contributions, and they do not add to the households' net resources. We therefore clarified in the final rule at paragraph (1) under this section that the following are not countable: resources (or portions of resources) obtained, arranged, provided, contributed, and/or paid for, by a low-income household for its own benefit, or which a low-income household is responsible for obtaining or required to provide for its own benefit or for the benefit of others, in order to receive a benefit of some type.

We also note that the LIHEAP statute and these regulations require that any costs and charges imposed on low-income households in order to receive counted resources/benefits must be offset from the value of these resources.

#### *Comment and Response*

Another commenter disagreed with the interim rule's exclusion of leveraged resources counted under the leveraging incentive program(s) of the low-income weatherization assistance program administered by the Department of Energy, or any other Federal leveraging incentive program. However, we continue to believe that leveraged resources should be countable only once—under one Federal leveraging program only—and therefore we retained this exclusion in the final rule.

#### *Comment and Response*

A commenter said that funds used as matching for other Federal programs should not be excluded from consideration as leveraged resources, because counting such funds “constitutes increasing the total amount of funds available from all sources to

assist low-income households with their home heating needs.” We do not agree. As with resources counted under another Federal leveraging program, we continue to believe that “leveraged” resources should be countable only once. In addition, the matching funds are required in order to receive Federal funds under the other program, and thus nothing new has been added to help low-income households that would not otherwise have been added.

#### *Comment and Response*

Another commenter recommended that interest paid on borrowed funds, and reductions in interest paid on borrowed funds, be countable “when it can be demonstrated that they do increase the amount of heat available to households.” Interest paid by a borrower to a commercial lender does not represent a net addition to the home energy resources of low-income households. On the other hand, if a late payment charge or “interest” is included in a low-income household's home energy bill and is paid with leveraged funds or is waived, the amount paid or waived could be countable. Also, as discussed earlier in this preamble, interest paid on funds borrowed from a revolving loan fund would not be countable when paid to the fund, but could be countable later when, like repaid principal, it is borrowed from the revolving loan fund and used for countable benefits. Reductions in interest paid on borrowed funds are not in themselves countable; leveraged funds that might have been used for interest but instead are used to provide countable benefits would be countable.

#### *Comment and Response*

A commenter stated that the value/costs of space, equipment, and paid staff donated by local agencies and energy suppliers should be countable because they are “crucial and an integral part of the service delivery system” and counting them would “facilitate more donations in these areas.” “Donation” of office or other space, office equipment, and paid or unpaid administrative staff do not provide direct, quantifiable home energy benefits for low-income households or result in a direct, quantifiable addition to these households' home energy resources. Therefore they are not countable. As we stated in the preamble to the interim rule,

donated materials such as office supplies and equipment do not result directly in a specific net addition to low-income households' total energy resources, as required by section 2607A(b)(1) of the LIHEAP statute. The same

can be said of donations of time by volunteers or staff to perform office or administrative chores. Even though this may result in the grantee being able to free some of its funds for other uses, it would be extremely difficult to assure and to document that any savings are used for direct benefits to low-income households.

#### *Comments and Response*

Nine commenters proposed that some or all energy conservation education costs be countable. As one of these commenters stated, these "efforts can yield significant cost savings for low-income consumers, and produce tangible benefits." Another stated that energy conservation education that "employs a proven curriculum" provides "a valid energy saving measure" and should be countable. Another suggested that the value of conservation education be quantified as three percent of the recipient households' energy bills, based on the commenter's understanding that these education programs "consistently result in an average 3% reduction in energy usage."

We agree that a well designed and implemented energy conservation education program presented to receptive households should result in reduced home energy consumption and costs. However, while the cost of providing energy conservation education can be quantified, we do not know a reliable way to determine the value of education as a net addition to the total energy resources of low-income households that would apply to all grantees. The quality of the education provided, the condition of different homes, and the motivation of different households to implement conservation measures are highly variable. We believe that the education activities themselves do not provide direct, quantifiable benefits or quantifiable net additions to households' home energy resources. The final rule therefore continues to exclude energy conservation education.

One of the nine commenters claimed that if energy education/case management activities are not countable under the leveraging program, "there will not be an incentive to the CAP agencies to provide energy case management services although it has been proven to be successful." Section 2607A of the LIHEAP statute allows the counting only of limited kinds of activities and services as leveraging. There are many additional worthwhile activities and services that benefit the program and the low-income households it exists to serve. (Local administering agencies and their staff generally are paid for providing these

services.) Grantees should not change successful activities that help low-income households simply to substitute activities that will count as leveraging.

#### *Changes*

Based on our experience in implementing the leveraging incentive program under the interim final rule and on comments we received on the interim rule, we retained most of the list at § 96.87(f) of resources and benefits that are not countable. For example, like the interim rule, the final rule does not allow the counting of office supplies and equipment, services for administrative activities, or any other services that do not result in a direct, net, quantifiable addition to low-income households' total energy resources, as required by section 2607A(b)(1) of the LIHEAP statute. Based on our experience in operating the leveraging program and on public comments indicating that some of the leveraging requirements in the interim rule were unclear or too loose, and to assure consistent understanding and avoid misunderstanding, we changed § 96.87(f) in the final rule by clarifying and tightening language in several places and by specifying that the following are not countable:

- Resources obtained, arranged, provided, contributed, and/or paid for, by a low-income household for its own benefit, or which a low-income household is responsible for obtaining or required to provide in order to receive some type of benefit;
- Resources provided, contributed, and/or paid for by building owners, building managers, and/or home energy vendors, if the cost of rent, home energy, or other charges to the recipient were or will be increased, or if other charges to the recipient were or will be imposed, as a result;
- Resources directly provided, contributed, and/or paid for by member(s) of the recipient household's family (parents, grandparents, great-grandparents, sons, daughters, grandchildren, great-grandchildren, brothers, sisters, aunts, uncles, first cousins, nieces, and nephews, and their spouses), regardless of whether the family member(s) lived with the household, unless the family member(s) also provided the same resource to other low-income households during the base period and did not limit the resource to members of their own family;
- Delivery, and discounts in the cost of delivery, of fuel, weatherization materials, and all other items;
- Purchase, rental, donation, and loan, and discounts in the cost of purchase and rental, or supplies and

equipment used for delivery, installation, and repairs;

- Oil overcharge funds that do not meet the definition in § 96.87(b)(4) of the regulations;
  - Interest earned/paid on oil overcharge funds that were distributed to a State or territory by DOE on or before October 1, 1990;
  - Interest earned/paid on Federal funds (grantees should draw down Federal funds only as needed for "immediate" use);
  - Interest earned/paid on customers' security deposits, utility deposits, etc., except when forfeited by the customer and used to provide countable benefits (interest is generally earned on such deposits and therefore would not be a leveraged benefit obtained for low-income households);
  - Borrowed funds that do not meet the requirements in § 96.87(b)(3) of the regulations (including loans made by and/or to low-income households);
  - Resources for which Federal payment or reimbursement has been or will be provided;
  - Training;
  - Installation, replacement, and repair of lighting fixtures and light bulbs (countable weatherization must be directly related to home energy, consistent with the definitions of "home energy" and "weatherization" in § 96.87(b) of the regulations); and
  - Activities involving smoke/fire alarms and asbestos removal that are not described in the final rule as countable.
- Also, in response to questions raised during the first two years of the leveraging program, we clarified the regulatory language regarding non-countable tax deductions and tax credits. The revised language specifies that tax deductions and tax credits received by donors of resources for these donations, and by vendors for providing discounts, waivers, etc., are not countable. If they meet the requirements in the LIHEAP statute and these regulations, the items and services donated and discounts/waivers provided would be countable. Counting tax deductions and tax credits received by the donors/vendors essentially would result in double counting the same benefit. In addition, tax deductions and tax credits received by donors of resources do not represent a net addition to the home energy resources available to low-income households, as required by the LIHEAP statute and these regulations. (On the other hand, as noted earlier, special non-Federal tax "credits" provided to low-income households to offset their home energy costs can be countable as discounts/waivers, and non-Federal

payments to low-income households from tax authorities to offset their home energy costs can be countable as cash resources/benefits—as long as Federal funds are not used to pay for these “credits” and payments, and they are not generally available to other households.)

#### *Leveraging Issues Relating to Tribal Grantees*

A number of leveraging issues relate specifically to Indian tribes and tribal organizations. These issues include countability of oil overcharge funds, resources obtained from trust lands, resources obtained from National Forests and Bureau of Land Management areas, and Public Law 93-638 funds. Several grantees have commented, formally in response to the January 1992 interim final rule, or informally, and asked questions concerning these issues. While researching these issues, we consulted with the Office of the General Counsel in HHS, the Office of the Solicitor and the Bureau of Land Management in the Department of the Interior, and the Office of the General Counsel and the Forest Service in the Department of Agriculture.

In addition, questions have been raised about the possibility of both a tribe and a State claiming the same leveraged resource.

The guidance that follows addresses these issues. We advised grantees of most of this guidance in LIHEAP Information Memorandum 92-19, dated June 25, 1992.

#### *Oil Overcharge Funds*

In accordance with Federal law, court orders, and agreements, the Department of Energy distributes petroleum violation escrow—PVE or oil overcharge—funds to States and territories, but not to Indian tribes or tribal organizations. In the preamble to the January 1992 interim final rule, we stated that, because oil overcharge funds are not distributed directly to tribes or tribal organizations, tribal LIHEAP grantees cannot count them under the LIHEAP leveraging incentive program. We noted that if a tribe receives PVE funds under a State LIHEAP program, the tribe would be a subgrantee or contractor of the State's program for the administration of these funds, and the funds would be used by the tribe as part of the State's LIHEAP program. Also, we noted that if a tribe and State agree that the tribe's direct Federal LIHEAP allotment is to be increased in lieu of the tribe receiving PVE funds under the State's LIHEAP program, the increased funds received by the tribe would be

regularly appropriated Federal LIHEAP funds, not PVE funds; the State would retain the actual PVE funds.

Several tribal grantees told us informally that they believe that tribes that obtain oil overcharge funds from the State(s) in which they are located and use these funds for home energy assistance should be able to count them under the leveraging incentive program, since the tribes in fact have leveraged those funds. Also, in its formal comments on the January 1992 preamble and interim rule, a State encouraged HHS “to allow tribes to offer as countable resources any oil overcharge funds [provided to them by the States in which they are located] that meet other criteria defined in the law” for countable leveraged resources.

After considering these comments, we determined that tribal LIHEAP grantees that receive oil overcharge funds from the State in which they are located (and/or interest the State earned on oil overcharge funds) and use these funds (and/or interest the tribes or tribal organizations earn on these funds) for home energy assistance (generally as subrecipients—subgrantees, contractors, or subcontractors—of the State) can count these funds under the leveraging program, as long as these funds meet all applicable statutory and regulatory requirements for countable leveraged resources, and the requirements in the following paragraphs.

If a tribe or tribal organization wants to count oil overcharge funds (and/or interest earned on oil overcharge funds) that it has used for home energy assistance as a subrecipient of the State, it must include with its leveraging report documentation or verification that (1) these particular oil overcharge funds (and/or the oil overcharge funds on which the interest was earned) were distributed by the Department of Energy to the State in which the tribal grantee is located after October 1, 1990, and (2) the State is not counting these particular funds as leveraged resources. A copy of a written statement from the State providing this information will meet this requirement. (As explained earlier in this preamble, consistent with the legislative history, the regulations require that countable PVE funds must be distributed by the Department of Energy after October 1, 1990. It is the State that knows when particular PVE distributions were made to it by DOE.)

In general, the criterion in § 96.87(d)(2) of this final rule under which a tribe would count these funds is criterion (iii), where the resource is distributed under the tribe's LIHEAP plan and integrated with its LIHEAP program. (The tribe's LIHEAP program

did not develop or acquire these funds from vendors through negotiation, regulation, or competitive bid, as required under criterion (i).) Tribes should be sure to meet all of the requirements for criterion (iii) in order to claim these oil overcharge funds under this criterion. Also, for purposes of leveraging, when a tribe uses oil overcharge funds received from its State in accordance with the LIHEAP statute and regulations and the tribe's LIHEAP application, essentially as if they were regular Federal LIHEAP funds, then the tribe may count these oil overcharge funds under criterion (ii). (Because the tribe received the overcharge funds from the State, rather than from the Federal government, the tribe is accountable to the State for their use.)

On the other hand, we have determined that Federal funds added to tribal grantees' LIHEAP allotments, in lieu of overcharge funds, cannot be counted as leveraged resources, because of the statutory requirement that countable leveraged resources be from non-Federal sources. In this case, the State has retained the actual oil overcharge funds, and the increased funds awarded to the tribe by HHS are regularly appropriated Federal LIHEAP funds from the State's gross LIHEAP allotment.

#### *Resources Obtained From Trust Land*

Tribes may obtain home energy resources, such as wood used to heat low income households' homes, from tribal or individual trust land. These trust lands are not Federal lands. Therefore, resources obtained from these lands are countable under the LIHEAP leveraging incentive programs, as long as they meet all relevant statutory and regulatory requirements.

It is important to trace the source of a resource/benefit to its origin, to determine whether it is countable. For example, if a tribe cuts firewood from tribal trust land and gives that firewood to low-income households, the fair market value of the wood at the time of “donation” is countable. However, if a tribe uses Federal LIHEAP funds to purchase firewood cut from an individual's trust land at fair market value, the wood is not countable, because it was bought with Federal funds and there was no discount in its price. If a tribe uses Federal funds to purchase firewood from an individual's trust land at a discount, then the amount of the discount is countable, as long as all relevant statutory and regulatory requirements for leveraged resources are met. The amount actually paid is not countable, because Federal funds were used. (If a tribe uses non-

Federal tribal funds to purchase firewood from an individual's trust land and gives the wood to low-income households, the wood's fair market value is countable.)

Donated or paid services specifically to cut firewood, mine coal, etc., are not countable under the leveraging incentive program. However, in many cases, the value of these services would be included in the fair market value of donated or purchased firewood, coal, etc., that is obtained from non-Federal land.

#### *Resources Obtained From National Forests and Bureau of Land Management Areas*

There are some circumstances under which free firewood can be cut from National Forest land; the Department of Agriculture sometimes issues permits to cut dead or downed trees or "slash" without a charge or fee. Also, there might possibly be situations where there is no charge or fee to cut firewood on Bureau of Land Management (BLM) land. The following two paragraphs discuss the countability of home energy resources obtained for free from National Forest and/or BLM land.

Resources such as firewood that are obtained from National Forests and BLM areas in general are considered Federal resources. Therefore, in general, they are not countable as leveraged resources under the LIHEAP leveraging incentive program. Donated or paid services to obtain such resources (e.g., to cut such firewood) also would not be countable.

In some cases, an Indian tribe might have treaty rights to specified timber or firewood resources on Federal lands administered by the Forest Service or the BLM. Where they exist, such treaty provisions may confer a right to usufruct, that is, a nonpossessory right to use timber, usually for domestic purposes. HHS will recognize such rights where they have been adjudicated by a court of competent jurisdiction or are recognized by the Federal agency administering the land in question. (HHS cannot make such determinations itself.) Where the usufructuary right is so adjudicated or recognized, a resource such as firewood would be considered a tribal or Indian resource—that is, non-Federal. Therefore, a home energy resource like firewood that is obtained in such a case would be countable under the leveraging incentive program, as long as the resource met all applicable statutory and regulatory requirements for leveraged resources.

More often, firewood is cut from National Forest or BLM land for payment, rather than for free. A tribe

might pay for a permit to cut firewood for domestic use, and/or it might pay for the amount of wood actually cut. If, for example, the tribe uses tribal funds to pay for this permit and/or to pay for the wood actually cut, then the tribal funds are the leveraged resource—the resource is cash; and the firewood, which is obtained in return for payment of the cash, is the benefit that is provided to low-income households. In this case, because the resource is non-Federal cash, the resource is countable, as long as all applicable statutory and regulatory requirements for leveraged resources and benefits are met. The value of the resource/benefit would be the amount that was actually paid for the permit and/or for the wood itself. If the wood is paid for with LIHEAP or other Federal funds, it would not be countable under the leveraging incentive program.

#### *Public Law 93-638 Contract and Grant Funds*

Several tribal grantees informally asked us whether contract and grant funds provided to them under Public Law 93-638, the Indian Self-Determination and Education Assistance Act, by the Bureau of Indian Affairs/Department of the Interior and the Indian Health Service/HHS are countable under the leveraging incentive program. Also, in its formal comments on the interim rule, a tribal organization requested that these funds be countable.

Contract and grant funds provided to tribes under Public Law 93-638 are considered to be Federal funds. Because they retain their character as Federal funds, they cannot be counted as leveraged resources under the LIHEAP leveraging incentive program.

Under certain circumstances, Public Law 93-638 contract and grant funds can be used as matching shares for other programs. However, the LIHEAP leveraging incentive program is not a matching (cost sharing or cost participation) program for which grantees provide matching shares. (If the Federal Public Law 93-638 funds were used as matching shares for a program other than LIHEAP, they still would not be countable under the leveraging incentive program, because Federal funds, and funds used as matching for other Federal programs, are not countable under the leveraging program.)

#### *Resources That Might Be Claimed by Both a Tribe and a State*

In some cases, a leveraged resource might be claimed by both a tribe or tribal organization and the State in

which it is located. For example, countable oil overcharge funds used by a tribe as a subrecipient of a State's LIHEAP program could be claimed by both. (The tribe might count these funds under criterion (iii) of § 96.87(d)(2), and the State might count them under criterion (ii).) Also, donation of weatherization materials might be negotiated with a home energy vendor by a State LIHEAP program (criterion (i)), but then a tribe might install the weatherization materials for its service population through its LIHEAP program (criterion (ii)) or under its LIHEAP plan and integrated with its LIHEAP program (criterion (iii)).

We have concluded that households served by such resources can be counted only once. It would be unfair to other grantees applying for leveraging incentive fund to count some households twice, for both a tribe and a State. We encourage tribes and States themselves to determine which should claim such a resource—or to have one claim some of the tribal households served and the other claim the remainder. (Under the formula for allocating leveraging incentive funds, the tribe, with its smaller regular LIHEAP allotment, would receive a comparatively larger "return" for the resource than the State would. However, as explained later in this preamble, under the final rule, no grantee can receive a leveraging incentive funds award greater than the smaller of its net regular LIHEAP allotment during the base period, or twice the final net value of its countable leveraged resources for the base period.) If a tribe and State cannot resolve the issue, HHS will decide on a case-by-case basis how such a resource should be claimed, depending on the comparative role of each grantee in obtaining and/or administering the resource in question.

#### *Valuation of Leveraged Resources*

Section 96.87(g) of the interim rule and the final rule concerns valuation and documentation of leveraged resources and offsetting costs.

The benefits of countable leveraging activities must be measurable and quantifiable in dollars. Using the best data available to them, grantees applying for leveraging incentive funds must quantify the actual value in dollars of countable leveraged resources/benefits provided to low-income households during the base period. Anticipated future benefits—for example, savings expected in home energy bills as a result of weatherization—cannot be counted.

The statute requires that grantees deduct from the gross value of leveraged

resources any costs the grantee incurred in leveraging the resources and any costs imposed on low-income households. These costs are discussed under "Valuation of Offsetting Costs" later in this preamble.

We received no comments regarding valuation of leveraged resources and offsetting costs.

Because the final rule adds discounts in the cost of specified services as countable resources (under § 96.87(e)(2)), we revised the valuation of countable paid services under § 96.87(g) as follows, for consistency:

Installation, replacement, and repair of weatherization materials, and other countable services, will be valued at rates consistent with those ordinarily paid for similar work, by persons of similar skill in this work, in the grantee's or subrecipient's organization in the local area, at the time these services were provided. If the grantee or subrecipient does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work, by persons of similar skill in this work, in the same labor market, at the time these services were provided. Fringe benefits and overhead costs will not be counted.

Because the final rule deletes delivery services and rented and loaned supplies and equipment as separate countable resources, we made a conforming change to § 96.87(g) to delete valuation of these services and items.

The final rule's other requirements for valuation of leveraged resources/benefits are substantially unchanged from the interim rule. They are summarized below.

Third-party donations of fuel, weatherization materials, and other countable tangible items must be valued at their fair market value at the time of donation, according to the best data available to the grantee.

Unpaid volunteer services must be valued at rates consistent with those ordinarily paid for similar work, by persons of similar skill in this work, in the grantee's or subrecipient's organization. If the grantee or subrecipient does not have employees doing similar work, the rates must be consistent with those ordinarily paid by other employers for similar work, by persons of similar skill in this work, in the same labor market. Fringe benefits and overhead costs cannot be counted. Valuation of volunteers' services must vary according to the skill of the volunteer at the task. For example, the services of professional weatherization installers working at a volunteer weatherization project would be more highly valued than the services of unskilled weatherization volunteers.

When an employer other than a grantee or subrecipient furnishes free of charge the services of an employee in the employee's normal line of work, the services must be valued at the employee's regular rate of pay, excluding the employee's fringe benefits and overhead costs. If the services are in a different line of work, the valuation described in the previous paragraph applies.

The benefits provided by leveraged resources other than in-kind contributions must be valued as explained in the following paragraphs.

Cash benefits for heating, cooling, and energy crisis assistance must be valued at their actual amount at the time they were provided to, or on behalf of, the recipient household. Purchased fuel, weatherization materials, and other countable tangible items must be valued at their actual fair market value at the time of purchase, according to the best data available to the grantee. The fair market value of a fuel or tangible non-fuel item is the price or cost normally charged a customer in the same customer class, in the same local area, as the recipient household. Countable services, including installation, replacement, and repair of weatherization materials, must be valued as described earlier. Home energy discounts and credits must be valued at their actual value—the actual amount of the discount, reduction, waiver, or forgiveness.

Fuel purchased with leveraged cash at a discounted price and provided without charge to low-income households would be valued at the actual fair market value of the fuel—the commonly available household rate or cost—at the time it was purchased. Fuel purchased with leveraged cash at a discounted price and provided at a discount to low-income households would be valued at the actual fair market value of the fuel—the commonly available household rate or cost—at the time it was purchased, less (minus) the amount paid by the recipients. Only the amount of the net addition to recipient households' home energy resources may be counted.

When low-income households pay discounted prices or reduced rates for home energy (such as fuel oil or electricity), only the amount of the discount or reduction is countable. When low-income households receive home energy at no cost to themselves (for example, a LIHEAP grantee which has purchased fuel oil with leveraged resources or received donated fuel oil provides the oil to a household at no cost to the household), the amount the fuel would have cost the household at

"commonly available household rates" is countable.

Grantees may use leveraged funds, regularly appropriated LIHEAP funds, and leveraging incentive funds awarded to them, to purchase fuel or other approved tangible items at discounted prices. If the grantee uses leveraged funds, the gross value of the resource/benefit is the amount it would have cost the recipient households at the commonly available household rate or cost. This means that a grantee may count as leveraged resources both the leveraged funds and savings obtained through buying at a discount. For example, a grantee might use \$10,000 of its own funds to purchase fuel oil at a discount, so that it obtains oil that would be worth \$12,500 at commonly available household rates/costs. The grantee would have leveraged \$10,000 in cash and \$2,500 in discounts. If the grantee uses regular LIHEAP funds or leveraging incentive funds—that is, funds that are not countable leveraged resources—to purchase fuel or other approved tangible items at discounted prices, the gross value of the resource/benefit is the amount of the discount—the difference between the amount the item would have cost the recipient household at the commonly available household rate or cost and the reduced amount actually paid. For example, if the grantee had purchased the same fuel oil as above, at the same discounted price but with regular LIHEAP funds, it could count as leveraging only the \$2,500 in discounts.

#### *Valuation of Offsetting Costs*

Section 2607A(d) of the LIHEAP statute requires that, to determine the net dollar value of grantees' leveraged resources, grantees must subtract from the gross dollar value of leveraged resources they received or acquired during the base period any costs they incurred to leverage such resources and any costs imposed on federally eligible low-income households.

Funds from grantees' regular LIHEAP allotments that are used specifically to identify, develop, and demonstrate leveraging programs under section 2607A(c)(2) of the LIHEAP statute must be deducted as offsetting costs in leveraging reports covering the base period in which these funds were obligated, whether or not there were any leveraged benefits resulting from these particular funds. However, if a grantee does not submit a leveraging report covering the base period in which these funds were obligated, they should not be offset in future reports. Also, any funds from the grantee's LIHEAP planning and administrative funds that

are used to identify, develop, and demonstrate leveraging should not be deducted as offsetting costs. Such funds are likely to serve more than one planning/administrative purpose, and exact amounts spent to identify, develop, and demonstrate leveraging are likely to be difficult to identify and isolate.

Costs incurred from grantees' own funds to identify, develop, and demonstrate leveraging programs must be deducted in the first base period in which resulting leveraged benefits are provided to low-income households. If there is no resulting leveraged benefit from the expenditure of the grantee's own funds, the grantee's expenditure should not be counted or deducted.

Any costs assessed or charged to counted low-income households on a continuing or on-going basis, year after year, specifically to participate in a counted leveraging program or to receive counted leveraged resources must be deducted in the base period these costs are paid. Any one-time costs or charges to counted low-income households specifically to participate in a counted leveraging program or to receive counted leveraged benefits must be deducted in the first base period the program or resource is counted, even if those charges were made before this base period. These costs/charges are to be subtracted from the gross value of a counted resource/benefit for low-income households whose benefits are counted, but not for any low-income or other households whose benefits are not counted. On the other hand, nonspecific costs imposed on low-income households—such as costs resulting from increases in a utility company's general rates to pay for or support benefits for households in special programs—should not be deducted.

#### *Documentation of Resources, Benefits, and Costs*

Section 96.87(g)(8) of the interim rule required that grantees

maintain, or have readily available, records sufficient to document leveraged resources and benefits, and offsetting costs and charges, and their valuation. These records must be retained for three years after the end of the base period whose leveraged resources and benefits they document.

In addition, the preamble contained guidance regarding documentation, including a listing of the specific types of documentation that should be included in leveraging records maintained by, or readily available to, grantees.

#### *Comment and Response*

We received one comment concerning leveraging documentation. The commenter stated that grantees competing for leveraging incentive funds "have a right to expect each other to keep archives of material clearly documenting the flow of benefits claimed." The commenter agreed that HHS should require applicants to keep documentation for three years and make it available to HHS when needed. We retained these requirements in the final rule.

#### *Guidance on Documentation*

We retained—and repeat below for easy reference—most of the interim rule's preamble guidance on documentation.

Grantees should have clear, consistent, documented policies and procedures for documenting leveraged resources, benefits, and costs. Grantees are to maintain, or have readily available, records adequate to document leveraged resources and benefits, and offsetting costs and charges, and their valuation. (For example, a grantee—and/or subrecipients—should maintain records to document counted oil overcharge funds. A grantee should maintain and/or have easy access to documentation relating to counted fuel fund benefits.) These records are to consist of written and/or printed papers, etc., furnishing evidence that substantiates the claims made in the grantees' leveraging reports. These records are to be retained for three years after the end of the base period whose leveraged resources they document.

These records should include:

- Documentation of the sources of leveraged resources;
- Documentation of the negotiations, competitive bids, written agreements, legislation, regulations, and mandates through which leveraged resources were acquired or developed and under which they were provided;
- Documentation of recipient households' Federal eligibility, or eligibility for the grantee's LIHEAP program, as appropriate;
- Documentation of the type, amount, and value of leveraged benefits provided, including documentation of commonly available, local market household home energy rates or costs charged;
- Documentation of the type, amount, and value of in-kind contributions;
- Documentation of the costs incurred by the grantee to leverage resources and of the costs imposed on low-income households;

- Documentation of the calculation of the net addition to recipient households' home energy resources; and
- Documentation of the integration of leveraged resources with the grantee's LIHEAP program, as appropriate.

Recipient eligibility documentation should document each household's income or categorical eligibility. Benefit documentation should document the delivery and value of each benefit, including the amount or quantity and unit price, as appropriate.

We are requiring submission of some of this documentation with grantees' leveraging reports. We may require submission of additional documentation to clarify or support information submitted in a leveraging report.

Many of the resources submitted during the first three years of the leveraging incentive program were provided and administered at the subrecipient level. As discussed elsewhere in this preamble, such resources are countable if they meet all of the requirements for countable resources. In such cases, records likely will be kept at the local level, and information required for the leveraging report likely will be provided to State officials by local agencies. Again, this is acceptable, as long as the documentation discussed above is maintained and readily available both to State and Federal officials.

However, we emphasize that it is important for grantees to develop and institute procedures to ensure that this documentation is accurate and complete. In some cases, when we asked States for more information about particular resources administered by subrecipients, we found that the States not only had virtually no knowledge about the resources, but also were unable to obtain the necessary additional information from the local agencies.

We expect grantees to ensure that local agencies that provide and/or administer leveraged resources/benefits will receive adequate instruction or training in the requirements for countable resources and their valuation. Also, we expect grantees to institute monitoring procedures to ensure that such agencies maintain required documentation and provide accurate reports. In addition, as previously discussed in this preamble, resources counted under criteria (ii) and (iii) of § 96.87(d)(2) must be "appropriated or mandated" by the grantee—the State, tribe, tribal organization, or territory—for distribution to low-income households, either through its LIHEAP program (criterion (ii)) or as described in its LIHEAP plan and integrated and

coordinated with its LIHEAP program (criterion (iii))—not provided independently by local agencies.

#### *Leveraging Report*

Section 2607A(e) of the LIHEAP statute provides that grantees desiring leveraging incentive funds must submit a report to HHS that quantifies the grantee's leveraged resources for the base period. These reports are grantees' applications for leveraging incentive funds. Section 96.87(h) of the regulations lists requirements for these reports. In both the interim rule and this final rule, we included in the list only the information we believe we need to know in order to fulfill our responsibility to evaluate grantees' leveraged resources/benefits and to determine appropriate grantee shares of leveraging incentive funds.

HHS does not prescribe a format for grantees' annual applications for regular LIHEAP funds. However, because leveraging applications must include specific, comparable data for grantees "competing" for shares of a limited amount of leveraging incentive funds, the interim rule and this final rule specify that leveraging reports must be in a format established by HHS. The LIHEAP leveraging report form has received Office of Management and Budget clearance through May 1995 and was used by grantees applying for leveraging incentive funds in fiscal years 1992, 1993, and 1994.

Grantee leveraging reports must describe the leveraged resources/benefits provided to low-income households during the base period, and must indicate the grantee's valuation of these resources and of the costs of leveraging them. Grantees should report these amounts as whole numbers rounded to the nearest whole dollar or rounded to the nearest multiple of 10 or 100.

We received four letters commenting on § 96.87(h) of the interim final rule. This section includes the requirements that leveraging reports indicate the geographical area (for example, the cities and/or counties) in which the leveraged resources/benefits were provided to low-income households and state the month(s) and year(s) when these benefits were provided during the base period.

#### *Comments and Response*

Two States commented that grantees should not be required to include in their leveraging reports either the geographical area or the months and years in which benefits were provided. One of these comments recommended instead that grantees provide "assurance

that the reported resources were provided during the required base period and in the grantee's LIHEAP service area."

However, we retained these requirements in the final rule, for the following reasons. This information helps to identify each resource. We have found it to be useful and believe that Congress and other interested parties may find it useful as well. It should not be difficult for grantees to include in their reports. Also, while reviewing reports on leveraging activities, we have found that several grantees that indicated the appropriate base period at the top of their leveraging report forms included dates in the report itself, where they were required to state the month(s) and year(s) of the base period in which benefits were provided, that showed that the benefits actually were not provided in the base period for which the report was submitted. The requirement thus serves as a check to assure that benefits were provided in the proper base period.

However, in response to commenters' concerns about reporting requirements and paperwork burden, we changed the final rule to remove the requirement that grantees explain how reported resources/benefits valued under \$5,000 meet criterion (i) or criterion (iii), as appropriate, under § 96.87(d)(2). The interim rule required that grantees explain how all resources reported for these criteria meet the appropriate criterion or criteria; the final rule requires this explanation only for resources valued at \$5,000 or more. It is not intended that grantees divide large resources into smaller components of less than \$5,000 in order to avoid the documentation requirement. Resources valued under \$5,000 are subject to verification by HHS during compliance reviews, as are larger resources.

#### *Comment and Response*

Section 2607A(f) of the LIHEAP statute provides that HHS "may request any documentation" that it "determines necessary for the verification" of grantees' applications for leveraging incentive funds. Section 96.87(h) of the interim rule required that leveraging reports state the dollar value of each resource/benefit, "indicate the source(s) of the data used, and describe how the grantee quantified the value and calculated the total amount." It also provided that HHS

may require submission of additional documentation and/or clarification as it determines necessary to verify information in a grantee's leveraging report, to determine whether a leveraged resource is countable, and/or to determine the net valuation of a

resource. In such cases, the Department will set a date by which it must receive information sufficient to document countability and/or valuation.

A commenter believed that HHS should require grantees to provide with their leveraging reports an "extensive annotated listing" of their documentation, detailing the data contained in each document, "the claim to resources it supports and its physical location."

We decline to require grantees to submit routinely with their leveraging reports the additional documentation proposed by this commenter. We believe that the burden of compiling and submitting the "extensive annotated listing" on a routine basis would clearly outweigh the possible benefits. Further, the regulations require that detailed documentation be readily available and submitted to HHS upon request. In addition, we monitor grantees' leveraging records when we conduct compliance reviews.

However, to reduce the chance of misunderstanding regarding the importance of grantees' maintaining accurate records that properly document their claimed resources and submitting any additional information requested by HHS, we have added the following clarification to section 96.87(h)(3): in cases when HHS requires submission of additional documentation and/or clarification, "if the Department does not receive information that it considers sufficient to document countability and/or valuation by the date it has set, then the Department will not count the resource (or portion of resource) in question."

#### *Submission Dates for Leveraging Reports*

Section 2607A(e) of the LIHEAP statute as amended in 1990 provided that grantees must submit their leveraging reports to HHS by July 31 of each year in order to qualify for leveraging incentive funds. Public Law 102-394, which provided FY 1993 LIHEAP appropriations, anticipated that, beginning in July 1994, LIHEAP funds would be available on the basis of the "forward funding" program year of July 1 through June 30. As we explained in the interim rule's preamble, we believe it was reasonable to assume that Congress intended the July 31 date to apply only after "forward funding" began, when July 31 would be one month after the end of the program year or base period whose leveraging activities were reported. Grantees would then be able to report leveraging activities for the entire program year.

However, with LIHEAP funds available for obligation on the basis of the Federal fiscal year starting October 1, if grantees were required to submit leveraging reports by July 31, they would not be able to include leveraging activities for the last two or three months of the fiscal year. The interim rule therefore modified the reporting dates for reports to be submitted before forward funding began. The deadline for submission of reports while LIHEAP funding is provided to grantees on the basis of the Federal fiscal year of October 1 through September 30 was set as October 31 of the fiscal year for which leveraging incentive funds are requested—on month after the end of the fiscal year or base period for which leveraging activities are reported.

In a comment on the interim rule, a State recommended that HHS change the leveraging report submission deadline to two months after the end of the base period, to allow local entities at least one month to report leveraging results for the full base period to States, and to allow a "reasonable amount of time" for States to analyze the reports and include allowable resources in their leveraging reports.

The Human Services Amendments of 1994, Public Law 103-252, enacted May 18, 1994, reauthorizing LIHEAP through FY 1999, provides for forward or advance funding (that is, funding appropriated one year in advance) on the basis of the Federal fiscal year of October 1 through September 30. Thus, the July through June program year will not be implemented.

Public Law 103-252 specifies that leveraging reports are to be submitted "2 months after the close of the fiscal year" during which the grantee provided the leveraged resources to eligible households. The final rule makes this technical change to the regulations at § 96.87(h)(2), stating that "Leveraging reports must be postmarked or hand-delivered not later than November 30 of the fiscal year for which leveraging incentive funds are requested." Leveraging reports submitted later will not be considered for a share of leveraging incentive funds. The new deadline is two months after the end of the base period and two months "into" the award period, effective with the leveraging reports to be submitted on FY 1994 leveraging activities. (The report on FY 1994 leveraging activities must be submitted by November 30, 1994. Any

LIHEAP plan amendments necessary to qualify FY 1994 leveraging activities under criterion (ii) or criterion (iii) of section 96.87(d)(2) must be submitted by September 30, 1994.)

Leveraging reports should be mailed or delivered to the following address: Director, Office of Community Services, Administration for Children and Families, Department of Health and Human Services, 370 L'Enfant Promenade, S.W., Washington, D.C. 20447.

#### *Determination of Grantee Shares of Leveraging Incentive Funds*

Section 96.87(i) of the interim final rule set the formula used to allocate leveraging incentive funds among grantees submitting leveraging reports. The formula in the interim rule was used to allocate leveraging incentive funds in fiscal years 1992, 1993, and 1994. As indicated under "Effective Date" near the beginning of this preamble, it also will be used to allocate leveraging incentive funds in FY 1995 that reward FY 1994 leveraging activities. This means that the revised formula included in this final rule and described below will be used beginning with leveraging incentive funds awarded in FY 1996 to reward FY 1995 leveraging activities.

Section 2607A of the LIHEAP statute requires HHS to develop a formula for allocating leveraging incentive funds that takes into account the size of the grantee's regular LIHEAP allotment (allocation), and the value of the grantee's leveraged resources in relation to its regular allotment amount. The legislative history also includes recommendations for the formula.

After considering ideas for possible formulas, and then three different formulas under three different scenarios, we selected the two-part formula that was in the interim rule. The formula we selected, which we called "Formula One," was intended to carry out Congress' intent to give the largest reward to the grantees that were most successful in leveraging their LIHEAP dollars. We included in the preamble to the interim rule a detailed discussion of the three formulas, with examples of how allocations would differ under each. (See pp. 1972-1976 of the **Federal Register** dated January 16, 1992; 57 FR 1972-1976.)

Under the interim rule's formula, we distributed half of the leveraging

incentive funds for an award period based on the value of the leveraged resources/benefits provided by a grantee during the base period relative to its net allotment under the regular LIHEAP program during the base period, as a proportion of the total value of leveraged resources/benefits provided by all grantees in relation to their regular net allotments during the same period. We distributed the remaining half of the funds based on the value of leveraged resources/benefits that a grantee provided during the base period as a proportion of the total value of leveraged resources/benefits provided by all grantees. No grantee could receive a leveraging incentive award larger than its regular LIHEAP allotment during the base period. When the formula would have resulted in a grantee receiving an incentive award larger than its regular allotment, the "excess" funds were reallocated to the other grantees receiving leveraging incentive funds. The leveraging figures used in these calculations were based on the net value of the countable leveraged resources in grantees' leveraging reports, as approved by HHS.

We received eleven comments regarding the formula used to determine grantee shares of leveraging incentive funds. Some of the commenters supported our selection of Formula One, while others suggested using a different formula or modifying our selection in some way.

In determining what allocation formula to adopt in this final rule, we considered not only the comments we received, but also experience we have gained in the last three grant periods in using Formula One for allocations based on the actual leveraging reports submitted by grantees. We reconsidered all three of the formulas discussed in the preamble to the interim rule and calculated what leveraging grant awards would have been in FY 1994 if we had used each of them. The actual FY 1994 awards—based on Formula One—are shown below, as are the allocations that would have resulted if we had used Formula Two and Formula Three, and State and territorial allocations that would have resulted if we had distributed the funds under the regular LIHEAP block grant allocation formula, rather than using them in the leveraging incentive program.

LOW-INCOME HOME ENERGY ASSISTANCE PROGRAM—FINAL TOTALS FOR FISCAL YEAR 1994 LEVERAGING INCENTIVE GRANTS

Grantee	Fiscal year 1993 lev \$	Fiscal year 1993 regular allot \$	Formula one total share of \$25 M for fis- cal year 1994	Formula two total share of \$25 M for fis- cal year 1994	Formula three total share of \$25 M for fiscal year 1994	Regular block grant allocation formula <sup>1</sup>
Alabama .....	\$4,806,142	\$11,280,337	\$345,359	\$701,732	\$113,424	\$214,720
Alaska .....	5,962,440	4,717,311	767,112	2,081,738	417,434	137,061
Arizona .....	3,734,137	4,834,769	471,567	1,272,070	159,749	103,841
Arkansas .....	296,071	8,655,748	24,941	56,336	561	163,842
California .....	62,681,576	60,489,538	2,422,358	1,706,696	3,597,770	1,151,911
Colorado .....	12,845,031	21,218,391	677,400	997,055	430,717	401,635
Connecticut .....	10,408,642	27,680,140	496,176	619,330	216,797	523,947
Delaware .....	302,815	3,674,006	47,354	135,748	1,382	69,544
Dist. of Col. ....	1,515,878	4,298,771	209,438	580,787	29,609	81,370
Florida .....	196,428	17,935,527	11,140	18,038	119	339,751
Idaho .....	776,651	8,154,122	67,966	156,872	4,097	156,665
Illinois .....	2,769,870	76,613,847	102,605	59,545	5,547	1,450,196
Indiana .....	3,045,067	34,688,598	134,922	144,579	14,806	656,608
Iowa .....	137,864	24,584,274	6,863	9,236	43	465,347
Kentucky .....	796,475	18,051,829	45,034	72,669	1,947	341,697
Louisiana .....	292,500	11,589,893	20,699	41,566	409	219,518
Maine .....	4,740,507	17,332,318	273,066	450,469	71,817	339,434
Maryland .....	18,267,659	21,194,333	963,820	1,419,580	872,127	401,180
Massachusetts .....	40,715,017	55,359,810	1,602,173	1,211,314	1,658,626	1,048,068
Michigan .....	27,757,124	72,601,649	1,037,432	629,687	587,809	1,376,834
Minnesota .....	7,119,144	52,403,709	283,485	223,750	53,571	991,931
Mississippi .....	493,047	9,714,872	38,673	83,589	1,386	184,089
Missouri .....	1,221,353	30,602,562	56,280	65,732	2,700	579,265
Montana .....	1,322,366	8,238,065	114,959	264,377	11,757	183,758
Nevada .....	839,136	2,576,577	176,024	536,396	15,138	48,771
New Hampshire .....	2,153,023	10,480,307	161,422	338,354	24,500	198,378
New Jersey .....	77,849,703	51,321,226	3,114,419	2,498,368	6,541,100	972,969
New Mexico .....	430,906	6,369,423	44,529	111,424	1,615	130,002
New York .....	136,047,801	167,660,542	4,595,541	1,336,464	6,114,853	3,176,890
North Carolina .....	1,894,735	24,477,911	94,445	127,488	8,124	473,453
North Dakota .....	508,805	9,365,661	40,808	89,477	1,531	199,616
Ohio .....	23,155,352	67,776,399	875,896	562,690	438,186	1,282,915
Oklahoma .....	1,504,870	9,678,967	118,301	256,075	12,960	197,372
Oregon .....	3,998,678	16,445,150	236,066	400,475	53,855	311,284
Pennsylvania .....	63,174,400	90,152,177	2,283,149	1,154,148	2,452,110	1,706,458
Rhode Island .....	1,945,150	9,076,024	159,061	352,983	23,091	172,518
South Carolina .....	550,490	9,009,177	45,222	100,638	1,863	170,531
South Dakota .....	282,427	7,292,137	26,602	63,789	606	162,123
Tennessee .....	422,992	18,286,116	23,779	38,098	542	346,131
Utah .....	1,682,970	9,693,988	132,178	285,937	16,184	186,641
Vermont .....	980,437	7,855,363	87,904	205,565	6,778	148,691
Virginia .....	1,471,001	25,817,067	71,888	93,843	4,643	488,682
Washington .....	15,620,693	25,953,922	761,918	991,274	520,753	512,020
Wisconsin .....	19,992,724	47,170,863	815,604	698,063	469,358	892,880
Wyoming .....	61,886	3,947,822	9,142	25,819	54	74,727
Northern Mariana .....	100,809	22,355	22,355	22,355	22,355	423
AK Tanana Chiefs .....	14,078	648,973	10,428	35,728	17	.....
AK Tlingit & Haida .....	17,940	384,423	22,048	76,862	46	.....
AZ Quechan Tribe .....	12,265	1,054	1,054	1,054	7,905	.....
CA Rincon Band .....	12,401	10,523	10,523	10,523	809	.....
CA San Pasqual Band .....	100	1,796	1,796	1,796	0	.....
ID Shoshone-Bannock .....	17,299	92,612	86,558	92,612	179	.....
MI Inter-Tribal Cnl .....	11,303	31,196	31,196	31,196	227	.....
MI Sault Ste. Marie .....	22,760	86,569	86,569	86,569	331	.....
MS Band of Choctaw .....	2,960	10,554	10,554	10,554	46	.....
MT Assin & Sioux .....	27,000	287,713	44,056	154,561	140	.....
MT Blackfeet Tribe .....	31,566	465,164	32,232	111,766	119	.....
MT C Salish Kootenai .....	15,967	266,686	28,068	98,609	53	.....
OK Cherokee Nation .....	37,000	342,717	50,867	177,813	221	.....
OK Choctaw Nation .....	21,750	197,057	51,505	181,787	133	.....
OK Kiowa Tribe .....	15,651	14,668	14,668	14,668	925	.....
OK Seneca-Cayuga Trb .....	2,276	2,296	2,296	2,296	125	.....
SD Sisseton-Wahpeton .....	45,065	116,073	116,073	116,073	969	.....
SD Yankton Sioux Trb .....	27,000	64,631	64,631	64,631	625	.....
WA Colville Conf Trb .....	44,000	239,114	86,109	239,114	448	.....
WA Kalispel Ind Comm .....	2,394	4,463	4,463	4,463	71	.....
WA Lummi Tribe .....	9,600	67,598	65,701	67,598	76	.....

**LOW-INCOME HOME ENERGY ASSISTANCE PROGRAM—FINAL TOTALS FOR FISCAL YEAR 1994 LEVERAGING INCENTIVE GRANTS—Continued**

Grantee	Fiscal year 1993 lev \$	Fiscal year 1993 regular allot \$	Formula one total share of \$25 M for fis- cal year 1994	Formula two total share of \$25 M for fis- cal year 1994	Formula three total share of \$25 M for fiscal year 1994	Regular block grant allocation formula <sup>1</sup>
WA Muckleshoot Tribe .....	30,112	24,129	24,129	24,129	2,081	.....
WA Port Gamble S'Kl .....	970	11,145	11,145	11,145	5	.....
WA Yakima Nation .....	15,000	267,855	26,256	92,233	47	.....
Total .....	567,309,248	1,229,982,602	25,000,000	25,000,000	25,000,000	23,435,689

<sup>1</sup> The "Regular Block Grant Allocation Formula" column does not add to \$25 million because under this formula a portion is set aside for all states and territories, including those that did not apply for leveraging incentive funds. In addition, we have not calculated awards for the tribal grantees whose share of regular block grant funds comes out of their States' allotments.

We also considered several other options to determine whether we could devise a new formula that resulted in a fairer distribution of the funds, but we found that these other formulas were hard to understand and use and even harder to explain, and did not provide results that were any fairer than Formula One's. After consideration of all these results and the comments we received, we decided to continue with Formula One, with modifications as outlined below.

*Comments and Response*

Two of the commenters agreed with our choice of Formula One. Two others suggested the use of Formula Two from the interim rule's preamble, which would have distributed all of the funds based on the first half of Formula One (that is, based on the amount of leveraging each grantee carried out relative to the size of its regular allotment, as a proportion of the total amount of leveraging carried out by all grantees relative to their regular allotments). We seriously considered

selecting Formula Two at the time we published the interim final rule, but felt then that Formula One was fairer overall. Our experience in the last three grant periods with our formula pointed out an unexpected result with the first half of Formula One, and thus with Formula Two as well. The actual FY 1994 leveraging incentive grant awards, determined using Formula One, are shown below, along with details of how the allocations were calculated. (Some numbers were affected by rounding.)

**LOW-INCOME HOME ENERGY ASSISTANCE PROGRAM—FINAL TOTALS FOR FY 1994 LEVERAGING INCENTIVE GRANTS  
FORMULA ONE**

Grantee	FY 1993 lev \$	FY 1993 regu- lar allot \$	Lev \$ div. by allot \$	Grant- ee per- cent	Part one share	Grant- ee per- cent of lev \$	Part two share	Preliminary total share of \$25 M	Final total share of \$25 M for FY 1994
A	B	C	D	E	F	G	H	I	J
Alabama .....	\$4,806,142	\$11,280,337	0.4261	1.11	\$139,319	0.85	\$105,898	\$245,217	\$345,359
Alaska .....	5,962,440	4,717,311	1.2639	3.31	413,301	1.05	131,375	544,676	767,112
Arizona .....	3,734,137	4,834,769	0.7724	2.02	252,552	0.66	82,277	344,829	471,567
Arkansas .....	296,071	8,655,748	0.0342	0.09	11,185	0.05	6,524	17,709	24,941
California .....	62,681,576	60,489,538	1.0362	2.71	338,841	11.05	1,381,116	1,719,957	2,422,358
Colorado .....	12,845,031	21,218,391	0.6054	1.58	197,952	2.26	283,025	480,977	677,400
Connecticut .....	10,408,642	27,680,140	0.3760	0.98	122,960	1.83	229,342	352,302	496,176
Delaware .....	302,815	3,674,006	0.0824	0.22	26,951	0.05	6,672	33,623	47,354
Dist. of Col. ....	1,515,878	4,298,771	0.3526	0.92	115,307	0.27	33,401	148,708	209,438
Florida .....	196,428	17,935,527	0.0110	0.03	3,582	0.03	4,328	7,910	11,140
Idaho .....	776,651	8,154,122	0.0952	0.25	31,145	0.14	17,113	48,258	68,966
Illinois .....	2,769,870	76,613,847	0.0362	0.09	11,822	0.49	61,031	72,853	102,605
Indiana .....	3,045,067	34,688,598	0.0878	0.23	28,704	0.54	67,095	95,799	134,922
Iowa .....	137,864	24,584,274	0.0056	0.01	1,835	0.02	3,038	4,873	6,863
Kentucky .....	796,475	18,051,829	0.0441	0.12	14,427	0.14	17,549	31,976	45,034
Louisiana .....	292,500	11,589,893	0.0252	0.07	8,252	0.05	6,445	14,697	20,699
Maine .....	4,740,507	17,332,318	0.2735	0.72	89,434	0.84	104,452	193,886	273,066
Maryland .....	18,267,659	21,194,333	0.8619	2.25	281,838	3.22	402,507	684,345	963,820
Massachusetts .....	40,715,017	55,359,810	0.7355	1.92	240,490	7.18	897,108	1,137,598	1,602,173
Michigan .....	27,757,124	72,601,649	0.3823	1.00	125,016	4.89	611,596	736,612	1,037,432
Minnesota .....	7,119,144	52,403,709	0.1359	0.36	44,422	1.25	156,862	201,284	283,485
Mississippi .....	493,047	9,714,872	0.0508	0.13	16,595	0.09	10,864	27,459	38,673
Missouri .....	1,221,353	30,602,582	0.0399	0.10	13,050	0.22	26,911	39,961	56,280
Montana .....	1,322,366	8,238,065	0.1605	0.42	52,488	0.23	29,137	81,625	114,959
Nevada .....	839,136	2,576,577	0.3257	0.85	106,494	0.15	18,489	124,983	176,024
New Hampshire .....	2,153,023	10,480,307	0.2054	0.54	67,176	0.38	47,439	114,615	161,422
New Jersey .....	77,849,703	51,321,226	1.5169	3.97	496,017	13.72	1,715,328	2,211,345	3,114,419
New Mexico .....	430,906	6,369,423	0.0677	0.18	22,122	0.08	9,495	31,617	44,529
New York .....	136,047,801	167,660,542	0.8114	2.12	265,337	23.98	2,997,655	3,262,992	4,595,541
North Carolina .....	1,894,735	24,477,911	0.0774	0.20	25,311	0.33	41,748	67,059	94,445
North Dakota .....	508,805	9,365,661	0.0543	0.14	17,764	0.09	11,211	28,975	40,808
Ohio .....	23,155,352	67,776,399	0.3416	0.89	111,715	4.08	510,201	621,916	875,896
Oklahoma .....	1,504,870	9,678,967	0.1555	0.41	50,840	0.27	33,158	83,998	118,301

LOW-INCOME HOME ENERGY ASSISTANCE PROGRAM—FINAL TOTALS FOR FY 1994 LEVERAGING INCENTIVE GRANTS  
FORMULA ONE—Continued

Grantee	FY 1993 lev \$	FY 1993 regu- lar allot \$	Lev \$ div. by allot \$	Grant- ee per- cent	Part one share	Grant- ee per- cent of lev \$	Part two share	Preliminary total share of \$25 M	Final total share of \$25 M for FY 1994
A	B	C	D	E	F	G	H	I	J
Oregon .....	3,998,678	16,445,150	0.2432	0.64	79,509	0.70	88,106	167,615	236,066
Pennsylvania .....	63,174,400	90,152,177	0.7008	1.83	229,140	11.14	1,391,974	1,621,114	2,283,149
Rhode Island .....	1,945,150	9,076,024	0.2143	0.56	70,080	0.34	42,859	112,939	159,061
South Carolina .....	550,490	9,009,177	0.0611	0.16	19,980	0.10	12,129	32,109	45,222
South Dakota .....	282,427	7,292,137	0.0387	0.10	12,665	0.05	6,223	18,888	26,602
Tennessee .....	422,992	18,286,116	0.0231	0.06	7,564	0.07	9,320	16,884	23,779
Utah .....	1,682,970	9,693,988	0.1736	0.45	56,769	0.30	37,082	93,851	132,178
Vermont .....	980,437	7,855,363	0.1248	0.33	40,812	0.17	21,603	62,415	87,904
Virginia .....	1,471,001	25,817,067	0.0570	0.15	18,631	0.26	32,412	51,043	71,888
Washington .....	15,620,693	25,953,922	0.6019	1.57	196,804	2.75	344,184	540,988	761,918
Wisconsin .....	19,992,724	47,170,863	0.4238	1.11	138,591	3.52	440,516	579,107	815,604
Wyoming .....	61,886	3,947,822	0.0157	0.04	5,127	0.01	1,364	6,491	9,142
Northern Mariana .....	100,809	22,355	4.5094	11.80	1,474,550	0.02	2,221	1,476,771	22,355
Alaska:									
Tanana Chiefs Conf. ....	14,078	648,973	0.0217	0.06	7,094	0.00	310	7,404	10,428
Tlingit & Haida CC .....	17,940	384,423	0.0467	0.12	15,260	0.00	395	15,655	22,048
Arizona: Quechan Tribe .....	12,265	1,054	11.6366	30.44	3,805,080	0.00	270	3,805,350	1,054
California:									
Rincon Band .....	12,401	10,523	1.1785	3.08	385,345	0.00	273	385,618	10,523
San Pasqual Band .....	100	1,796	0.0557	0.15	18,207	0.00	3	18,210	1,796
Idaho: Shoshone-Bannock Tr. ....	17,299	92,612	0.1868	0.49	61,078	0.00	381	61,459	86,558
Michigan:									
Inter-Tribal Coun. ....	11,303	31,196	0.3623	0.95	118,476	0.00	249	118,725	31,196
Sault Ste. Marie Tr. ....	22,760	86,569	0.2629	0.69	85,969	0.00	501	86,470	86,569
Mississippi: MS Band of									
Choctaw In .....	2,960	10,554	0.2805	0.73	91,709	0.00	65	91,774	10,554
Montana:									
Assin & Sioux (Ft Peck) ..	27,000	287,713	0.0938	0.25	30,686	0.00	595	31,281	44,056
Blackfeet Tribe .....	31,566	465,164	0.0679	0.18	22,190	0.01	696	22,886	32,232
Con Salish Kootenai .....	15,967	266,686	0.0599	0.16	19,577	0.00	352	19,929	28,068
Oklahoma:									
Cherokee Nat of OK .....	37,000	342,717	0.1080	0.28	35,302	0.01	815	36,117	50,867
Choctaw Nat of OK .....	21,750	197,057	0.1104	0.29	36,091	0.00	479	36,570	51,505
Kiowa Tribe .....	15,651	14,668	1.0670	2.79	348,906	0.00	345	349,251	14,668
Seneca-Cayuga Tribe .....	2,276	2,296	0.9913	2.59	324,143	0.00	50	324,193	2,296
South Dakota:									
Sisseton-Wahpeton .....	45,065	116,073	0.3882	1.02	126,954	0.01	993	127,947	116,073
Yankton Sioux Tribe .....	27,000	64,631	0.4178	1.09	136,603	0.00	595	137,198	64,631
Washington:									
Colville Conf Tribe .....	44,000	239,114	0.1840	0.48	60,171	0.01	969	61,140	86,109
Kalispel Ind Comm .....	2,394	4,463	0.5364	1.40	175,402	0.00	53	175,455	4,463
Lummi Tribe .....	9,600	67,598	0.1420	0.37	46,438	0.00	212	46,650	65,701
Muckleshoot Tribe .....	30,112	24,129	1.2480	3.26	408,072	0.01	663	408,735	24,129
Port Gamble S'Kl Tr .....	970	11,145	0.0871	0.23	28,469	0.00	22	28,491	11,145
Yakima Nation .....	15,000	267,855	0.0560	0.15	18,312	0.00	331	18,643	26,256
Total .....	567,309,248	1,229,982,602	38.2273	100.00	12,500,000	100.00	12,500,000	25,000,000	25,000,000

In this table, the following information is included in the columns:

Column A is the individual grantee.

Column B is the dollar value of countable leveraged resources that the grantee provided to low-income households during the base period, after deducting offsetting costs, as approved by HHS.

Column C is the amount of the grantee's regular LIHEAP allotment during the base period, net of any set-asides for direct-grant Indian tribes and tribal organizations in the case of a State.

Column D is the amount of a grantee's net countable leveraged resources as a proportion of its regular allotment (column B divided by column C).

Column E is the amount of a grantee's net countable leveraged resources divided by its regular allotment, as a proportion of the net countable resources leveraged by all grantees relative to their regular allotments, with the resulting figure expressed as a percent (column D divided by the total for column D).

Column F is the amount of leveraging incentive funds that a grantee would

receive under the first part of the formula (column E multiplied by one-half of the leveraging funds available, in this case \$12,500,000).

Column G is the grantee's net countable leveraged resources as a proportion of the net countable resources leveraged by all grantees (column B divided by the total for column B).

Column H is the amount of leveraging incentive funds that a grantee would receive under the second part of the formula (column G multiplied by one-

half of the leveraging funds available, in this case \$12,500,000).

Column I is a preliminary calculation of the total amount of leveraging incentive funds a grantee would receive under this two-part formula, if there were no limit on the amount of funds a grantee could receive (column F plus column H).

Column J is the final calculation of the total amount of leveraging incentive funds a grantee received. Because the interim rule provided that no grantee may receive a leveraging incentive award larger than its regular LIHEAP allotment, where the amount in column I exceeds the amount in column C, the "excess" funds were distributed on a proportionate basis to the other leveraging grantees.

We were surprised that this formula resulted in some tribal grantees receiving very large grants in proportion to the amount of leveraging they carried out (and the awards would have been even larger for half of the tribal grantees in FY 1994, had it not been for the limit that no grantee could receive a leveraging incentive award larger than its regular LIHEAP allotment). Under the first part of the formula in FY 1994, each grantee received about \$12,000 for each tenth of a percent (0.1 percent) that appears in column E in the chart above, no matter how large the grantee's regular allotment or the value of its approved leveraging activities. The basic determining factor in this first half of the formula is the value of the leveraging activities an individual grantee carries out in relation to the size of its regular allotment. For example, the State of Virginia leveraged \$1,471,001 and had a regular allotment in FY 1993 of \$25,817,067, which means it leveraged 5.7 percent of its regular grant amount, translating to 0.15 percent in column E. Based on these results, Virginia received \$18,631 under the first part of the formula. By comparison, the Yakima Indian Nation of Washington State leveraged \$15,000 and had a regular allotment in FY 1993 of \$267,855, which means it leveraged 5.6 percent of its regular grant amount, translating to 0.15 percent in column E. Based on these results, the Yakima Nation received \$18,312 under the first part of the formula. (Numbers are slightly different because of rounding.) Grantees that leveraged large dollar amounts made up for any "shortfall" under the first half of the formula by receiving large amounts under the second half of the formula, which rewards grantees based on the amount of leveraging they accomplished as a proportion of the amount leveraged by all grantees. In this case, Virginia

carried out 0.26 percent of all the leveraging activities carried out by all grantees for the year and received \$32,412 under the second half of the formula, while the Yakima Nation carried out 0.00264 percent of all the leveraging activities for the year (rounded to 0.00 percent in the chart above) and received \$331 under the second half of the formula. (Both Virginia and the Yakima Nation received additional funds when "excess awards" for other grantees were redistributed.) Grantees that carried out more leveraged activities did even better under the second half of the formula, as can be seen in the table above.

Based on these results, we do not believe it would be fair to all grantees to distribute the leveraging incentive funds on the basis of Formula Two. We believe the second half of Formula One balances out the first half, and makes it more fair to all. In addition, the first table above shows that Formula Three would skew the leveraging allocations much too heavily in favor of larger grantees, and thus would remove or reduce the incentive for smaller grantees to leverage resources. For these reasons, we decided to retain Formula One in the final rule.

#### *Comments and Response*

Some tribal grantees expressed concern that prohibiting a grantee from receiving a leveraging incentive award that is larger than the size of its regular allotment would unfairly affect tribal grantees, which are generally in greater need than State grantees. The prohibition against receiving more in leveraging incentive funds than in regular block grant funds affected only tribal grantees in fiscal years 1992 and 1993, and tribal and territorial grantees in FY 1994. Tribes in general did very well under the interim rule's formula, in most cases receiving considerably more than the value of the leveraging activities they carried out. (The amount awarded to tribal grantees under this formula was still relatively small compared with the amount awarded to States. In FY 1992, the eight tribal grantees receiving leveraging incentive funds received 2.27 percent of the leveraging incentive funds awarded. In FY 1993, the 19 tribal leveraging fund recipients received 4.58 percent of the leveraging incentive funds awarded. In FY 1994, the 24 tribal leveraging fund recipient received 3.53 percent of the leveraging incentive funds awarded.) As noted, several of the tribes would have received more than their regular grant amount under this formula were it not for the prohibition against this (we redistributed those "excess" funds on a

proportionate basis among the other grantees). In an extreme example, shown in the table above, the Port Gamble S'Klallam Tribe of Washington State leveraged \$970 in FY 1993 and received a leveraged grant award in FY 1994 of \$11,145, the same amount as its regular allotment in the base period of FY 1993. It would have received a grant award of \$28,491 had it not been for the limit on receiving no more than the size of its regular allotment. We think the actual grant award of \$11,145, based on \$970 in countable leveraging activities, is disproportionate and unfair to other grantees. An award of \$28,491 clearly would have been excessive.

Accordingly, we considered various ways of changing the formula or its limits to make the awards for tribes and other small grantees more equitable, while still giving them an advantage to compensate for their smaller size, reduced leverage, and generally higher level of poverty, compared with States.

Therefore, this final rule changes the formula at section 96.87(i) to provide that a grantee cannot receive a leveraging incentive award that is more than the smaller of (1) its regular LIHEAP net allotment during the base period, or (2) twice the net value of its countable leveraged resources for the base period. This means that the Port Gamble S'Klallam Tribe's leveraging award in FY 1994 would have been \$1,940 (twice the amount of the \$970 in countable leveraging carried out in the base period of FY 1993), rather than the \$11,145 the tribe received (the same amount as its regular FY 1993 allotment). We believe that this revision will be fairer to all grantees.

#### *Comments and Response*

Four commenters expressed concern that the bulk of the leveraging incentive funds should not go to one or just a few large grantees that carry out a large amount of leveraging, leaving little for others. Several other persons made similar comments informally. In general, we found that the formula as a whole tended to favor smaller grantees and to dampen the effect of large amounts of leveraging carried out by large grantees. For example, New York had countable leveraging activities in FY 1993 valued at \$136 million (with a regular FY 1993 allotment of \$167.7 million), which is about 24 percent of the total amount of \$567.3 million in leveraging carried out by all grantees. Its incentive grant award, however, was \$4.6 million, which is about 18.4 percent of the \$25 million in incentive grants. By comparison, Wyoming had countable leveraging activities of \$61,886 (0.01 percent of the total

amount of leveraging for all grantees) and a regular allotment of \$3.9 million, and received a leveraging incentive award of \$9,142, which is 0.04 percent of the \$25 million.

However, we recognize the potential for just a few grantees receiving the bulk of the available leveraging incentive funds in the future. In FY 1992, the four grantees with the largest amount of leveraged resources received a total of \$11,924,159, or 47.7 percent of the \$25 million distributed. In FY 1993, the four grantees with the most leveraging received \$11,658,428, or 47 percent of the \$24.8 million distributed. In FY 1994, the four grantees with the most leveraging received \$12,415,467, or 49.7 percent of the \$25 million distributed.

Accordingly, we changed the formula to stipulate that no grantee can receive a leveraging award larger than 12 percent of the total amount of leveraging incentive funds available for distribution in any award period. At a funding level of \$25 million for the leveraging incentive program, that means that no grantee could receive an award of more than \$3 million. We believe this allows for adequate compensation to a grantee that does a large amount of leveraging, while still leaving significant incentive for other grantees. We do not expect a large number of grantees to earn this maximum grant amount. (In FY 1992, FY 1993, and FY 1994, each of two States received more than 12 percent of the available leveraging funds.)

#### *Reexamining the Formula*

Public Law 103-252, enacted in May 1994, and the conference report on Public Law 103-252, do not mention the formula for distributing leveraging incentive funds. However, the Senate and House committee reports on predecessor bills do. Senate Report 103-251 states that "it would be appropriate for the Secretary to reconsider the regulations for the fund in order to give greater weight to rewarding initiatives affecting energy regulations, markets, and terms of service to LIHEAP-eligible households." House of Representatives Report 103-483 uses essentially the same language, except that it refers to "rewarding new initiatives affecting energy regulations, markets, and terms of service." We believe the public should have opportunity to comment on reconsideration of the formula based on this report language. We therefore will reexamine the formula based on this language in our forthcoming proposed rule to implement Public Law 103-252.

#### *Uses of Leveraging Incentive Funds*

Section 96.87(j) of the interim rule and the final rule concerns allowable and unallowable uses of leveraging incentive funds awarded to grantees by HHS. Regular LIHEAP funds and LIHEAP leveraging incentive funds are separately authorized in the LIHEAP statute—the former at section 2602(b), and the latter at section 2602(d). Section 2607A of the LIHEAP statute directs that leveraging incentive funds must be used to increase or maintain benefits to households—that is, they must be used for LIHEAP heating, cooling, crisis, and/or weatherization assistance, and they cannot be used for some of the purposes for which regular LIHEAP funds can be used.

#### *Comment and Response*

We received one comment on this section of the interim rule: a State agreed with the exemption of leveraging incentive funds from the weatherization maximum applied to regular LIHEAP funds, providing flexibility to grantees. We retained this provision in the final rule.

#### *Clarifications*

In accordance with the requirements of section 2607A, leveraging incentive funds cannot be used for costs of planning and administration. However, if a grantee receives more than a minimal leveraging fund award, it likely will need to use additional monies to administer these funds. We therefore said in the interim rule that leveraging incentive funds can be counted in the base for calculating the grantee's maximum planning and administrative costs. This is consistent with the treatment of oil overcharge funds under section 155 of Public Law 97-377 (the Warner Amendment) and Exxon oil overcharge funds. However, leveraging incentive funds may be obligated by the grantee either in the award period—the fiscal year in which they were awarded to the grantee—or in the following fiscal year. We believe it would not be appropriate to permit grantees to count the same leveraging incentive funds in the base for calculating administrative costs—thereby reducing the amount of regular LIHEAP grant funds used for benefits—in both years. In response to questions from grantees about the year in which to count incentive funds in the administrative cost calculation base, the final rule clarifies that leveraging incentive funds cannot be counted in the base for calculating maximum administrative and planning costs in both the award period and the following fiscal year. The entire leveraging award

does not have to be counted in the base in the same year—some may be counted in the award year and the remainder in the next. (Presumably they would be counted in the base in the year in which carrying out the activities they support increases the grantee's administrative/planning costs.) While the grantee has the discretion and flexibility to choose how much to count in the base in each year, the total amount from the leveraging award that is included in the base in both years combined cannot exceed the amount of the leveraging award.

As we said in the interim rule's preamble, grantees are to include the uses of their leveraging incentive funds in their LIHEAP plans. Uses must be covered in the plan for the fiscal year in which these funds will be used—either in the plan as originally submitted to HHS or in amendment(s) to the plan. We added this requirement to the final rule at a new § 96.87(j)(2), because of its importance, and to clarify and avoid misunderstanding. If the plan covers the uses of the leveraging incentive funds, it does not have to specify that leveraging incentive funds are involved. If the original plan does not cover these uses, then these uses must be added. For example, if leveraging incentive funds are to be used along with regular LIHEAP funds for cooling assistance that is described in the plan, then the plan need not specify that some of this assistance will be provided with leveraging incentive funds. However, if the grantee does not have a regular LIHEAP cooling assistance component and leveraging incentive funds are to be used for cooling assistance, the plan must include the cooling assistance supported by the leveraging funds.

The interim rule's preamble said that grantees are to document uses of leveraging incentive funds in the same way they document uses of regular LIHEAP funds, and that leveraging incentive funds are subject to the same audit requirements as regular LIHEAP funds. Because of their importance, and to clarify and avoid misunderstanding, we added these requirements to the final rule at section § 96.87(j)(2).

Finally, consistent with Public Law 101-501, which ended grantees' authority to transfer LIHEAP funds effective in FY 1994, the final rule deletes reference to transfers in § 96.87(j).

#### *Period of Obligation for Leveraging Incentive Funds*

Section 96.87(k) of the interim rule and the final rule concerns the period of time during which grantees can use

leveraging incentive funds awarded to them by HHS.

Incentive funds are awarded during the course of each award period, rather than at the beginning, since grantees' leveraging reports are to be submitted two months after each fiscal year begins, and since Federal review of these reports will follow. (Also, in fiscal years 1992 and 1993, Congress required HHS to make leveraging incentive fund awards in late September, at the end of the fiscal year/award period.) We therefore determine that leveraging incentive funds are not subject to the statutory and regulatory carryover and reallocation requirements that apply to regular LIHEAP funds. (Section 2607(b) of the LIHEAP statute provides that grantees may carry forward for use in the succeeding fiscal year no more than 10 percent of their regular LIHEAP funds payable for the prior fiscal year.) Instead, the interim rule provided that all leveraging incentive funds are available for obligation from the date they are awarded to a grantee until the end of the succeeding fiscal year. Thus, grantees could use these funds during the remainder of the fiscal year in which they were awarded, and throughout the following fiscal year.

#### *Comments and Response*

We received one written comment on this section in the interim rule: a State supported the exemption of leveraging incentive funds from the carryover limit applied to regular LIHEAP funds.

Based on informal grantee comments urging that we allow use of leveraging incentive funds to pay for appropriate activities carried out during the entire award period, this final rule changes § 96.87(k) to provide that leveraging incentive funds "are available for obligation during both the award period and the fiscal year following the award period, without regard to limitations on carryover of funds in section 2607(b)(2)(B)" of the LIHEAP statute. Grantees therefore can use leveraging incentive funds to reimburse themselves for appropriate obligations made in the award period before the leveraging award was made.

Any leveraging incentive funds not obligated for allowable purposes by the end of this obligation period must be returned to HHS. HHS will return such funds to the U.S. Treasury.

#### **Paperwork Reduction Act of 1980**

There are no new information collection requirements in this final rule which require approval under the Paperwork Reduction Act. The information collection requirements

affected by this final rule have previously been approved.

Section 96.87 of this final rule contains information collection requirements relating to applications for leveraging incentive funds. Section 2607A of the Low-Income Home Energy Assistance Act requires grantees to submit these leveraging reports in order to qualify for leveraging incentive funds. These reports are the only source of the information HHS needs in order to allocate leveraging incentive funds among grantees. ACF estimates the reporting burden on applicants for leveraging incentive funds to be 40 hours per applicant. As required by the Paperwork Reduction Act, HHS submitted these information collection requirement to the Office of Management and Budget (OMB) for its review. OMB approved these requirements and the LIHEAP leveraging report form (form no. ACF-119) through May 1995 (OMB clearance no. 0970-0121).

Section 96.83 of this final rule requires grantees to submit a waiver request if they wish to obligate more than 15 percent of their LIHEAP funds allotted or funds available in any fiscal year for weatherization activities. We expect to receive less than 10 waiver requests per year, and thus this provision is not subject to the Paperwork Reduction Act. We received only one waiver request in FY 1991, and no waiver requests in FY 1992 and FY 1993. We received seven waiver requests in FY 1994.

#### **Regulatory Impact Analysis**

Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this rule is consistent with these priorities and principles. An assessment of the costs and benefits of available regulatory alternatives (including not regulating) demonstrated that the approach taken in the regulation is the most cost-effective and least burdensome while still achieving the regulatory objectives.

#### **Regulatory Flexibility Act**

The Regulatory Flexibility Act (Pub. L. 96-354) requires the Federal government to anticipate and reduce the impact of regulations and paperwork requirements on small entities. The primary impact of these regulations is on State, tribal, and territorial governments. Therefore, the Department of Health and Human Services certifies that this final rule will not have a significant economic impact on a

substantial number of small entities because it affects payments to States, tribes, and territories. Thus, a regulatory flexibility analysis is not required.

#### **Catalog of Federal Domestic Assistance Program Number**

The Catalog of Federal Domestic Assistance program number for the low-income home energy assistance program (LIHEAP) is 93.568.

#### **List of Subjects in 45 CFR Part 96**

Energy, Grant programs-energy, Grant programs-Indians, Income assistance, Leveraging incentive program, Low and moderate income housing, Reporting and recordkeeping requirements, Weatherization.

Approved: April 4, 1995.

**Mary Jo Bane,**

*Assistant Secretary for Children and Families.*

For the reasons set forth in the preamble, part 96 of Title 45 of the Code of Federal Regulations as amended in the interim rule published in the **Federal Register** issue of January 16, 1992 (57 FR 1960) is adopted as final with the following changes and part 96 is further amended as set forth below:

#### **PART 96—[AMENDED]**

1. The authority citation for part 96 continues to read as follows:

**Authority:** 42 U.S.C. 300w *et seq.*; 42 U.S.C. 300x *et seq.*; 42 U.S.C. 300y *et seq.*; 42 U.S.C. 701 *et seq.*; 42 U.S.C. 8621 *et seq.*; 42 U.S.C. 9901 *et seq.*; 42 U.S.C. 1397 *et seq.*; 31 U.S.C. 1243 note.

#### **Subpart B—General Procedures**

2. Section 96.14(a)(2) is revised as follows:

##### **§ 96.14 Time period of obligation and expenditure of grant funds.**

(a) \* \* \*

(2) *Low-income home energy assistance.* Regular LIHEAP block grant funds authorized under section 2602(b) of Public Law 97-35 (42 U.S.C. 8621(b)) are available only in accordance with section 2607(b)(2)(B) of Public Law 97-35 (42 U.S.C. 8626(b)(2)(B)), as follows. From allotments for fiscal year 1982 through fiscal year 1984, a maximum of 25 percent may be held available for the next fiscal year. From allotments for fiscal year 1985 through fiscal year 1990, a maximum of 15 percent of the amount payable to a grantee and not transferred to another block grant according to section 2604(f) of Public Law 97-35 (42 U.S.C. 8623(f)) may be held available for the next fiscal year. From allotments for fiscal year 1991 through fiscal year 1993, a maximum of 10 percent of the amount payable to a

grantee and not transferred to another block grant according to section 2604(f) of Public Law 97-35 (42 U.S.C. 8623(f)) may be held available for the next fiscal year. Beginning with allotments for fiscal year 1994, a maximum of 10 percent of the amount payable to a grantee may be held available for the next fiscal year. No funds may be obligated after the end of the fiscal year following the fiscal year for which they were allotted.

\* \* \* \* \*

#### Subpart E—Enforcement

3. Section 96.50 is amended by revising the last sentence of paragraph (d) as follows:

##### **§ 96.50 Complaints.**

\* \* \* \* \*

(d) . . . Under the low-income home energy assistance program, within 60 days after receipt of complaints, the Department will provide a written response to the complainant, stating the actions that it has taken to date and, if the complaint has not yet been fully resolved, the timetable for final resolution of the complaint.

\* \* \* \* \*

#### Subpart H—Low-income Home Energy Assistance Program

4. Section 96.83 is revised as follows:

##### **§ 96.83 Increase in maximum amount that may be used for weatherization and other energy-related home repair.**

(a) *Scope.* This section concerns requests for waivers increasing from 15 percent to up to 25 percent of LIHEAP funds allotted or available to a grantee for a fiscal year, the maximum amount that grantees may use for low-cost residential weatherization and other energy-related home repair for low-income households (hereafter referred to as “weatherization”), pursuant to section 2605(k) of Public Law 97-35 (42 U.S.C. 8624(k)).

(b) *Public inspection and comment.* Before submitting waiver requests to the Department, grantees must make proposed waiver requests available for public inspection within their jurisdictions in a manner that will facilitate timely and meaningful review of, and comment upon, these requests. Written public comments on proposed waiver requests must be made available for public inspection upon their receipt by grantees, as must any summaries prepared of written comments, and transcripts and/or summaries of verbal comments made on proposed requests at public meetings or hearings. Proposed waiver requests, and any preliminary

waiver requests, must be made available for public inspection and comment until at least March 15 of the fiscal year for which the waiver is to be requested. Copies of actual waiver requests must be made available for public inspection upon submission of the requests to the Department.

(c) *Waiver request.* After March 31 of each fiscal year, the chief executive officer (or his or her designee) may request a waiver of the weatherization obligation limit for this fiscal year, if the grantee meets criteria in paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii) of this section, or can show “good cause” for obtaining a waiver despite a failure to meet one or more of these criteria. (If the request is made by the chief executive officer’s designee and the Department does not have on file written evidence of the designation, the request also must include evidence of the appropriate delegation of authority.) Waiver requests must be in writing and must include the information specified in paragraphs (c)(1) through (c)(6) of this section. The grantee may submit a preliminary waiver request for a fiscal year, between February 1 and March 31 of the fiscal year for which the waiver is requested. If a grantee chooses to submit a preliminary waiver request, the preliminary request must include the information specified in paragraphs (c)(1) through (c)(6) of this section; in addition, after March 31 the chief executive officer (or his or her designee) must submit the information specified in paragraphs (c)(7) through (c)(10) of this section, to complete the preliminary waiver request.

(1) A statement of the total percent of its LIHEAP funds allotted or available in the fiscal year for which the waiver is requested, that the grantee desires to use for weatherization.

(2) A statement of whether the grantee has met each of the following three criteria:

(i) In the fiscal year for which the waiver is requested, the combined total (aggregate) number of households in the grantee’s service population that will receive LIHEAP heating, cooling, and crisis assistance benefits that are provided from Federal LIHEAP allotments from regular and supplemental appropriations will not be fewer than the combined total (aggregate) number that received such benefits in the preceding fiscal year;

(ii) In the fiscal year for which the waiver is requested, the combined total (aggregate) amount, in dollars, of LIHEAP heating, cooling, and crisis assistance benefits received by the grantee’s service population that are provided from Federal LIHEAP

allotments from regular and supplemental appropriations will not be less than the combined total (aggregate) amount received in the preceding fiscal year; and

(iii) All LIHEAP weatherization activities to be carried out by the grantee in the fiscal year for which the waiver is requested have been shown to produce measurable savings in energy expenditures.

(3) With regard to criterion in paragraph (c)(2)(i) of this section, a statement of the grantee’s best estimate of the appropriate household totals for the fiscal year for which the waiver is requested and for the preceding fiscal year.

(4) With regard to criterion in paragraph (c)(2)(ii) of this section, a statement of the grantee’s best estimate of the appropriate benefit totals, in dollars, for the fiscal year for which the waiver is requested and for the preceding fiscal year.

(5) With regard to criterion in paragraph (c)(2)(iii) of this section, a description of the weatherization activities to be carried out by the grantee in the fiscal year for which the waiver is requested (with all LIHEAP funds proposed to be used for weatherization, not just with the amount over 15 percent), and an explanation of the specific criteria under which the grantee has determined whether these activities have been shown to produce measurable savings in energy expenditures.

(6) A description of how and when the proposed waiver request was made available for timely and meaningful public review and comment, copies and/or summaries of public comments received on the request (including transcripts and/or summaries of any comments made on the request at public meetings or hearings), a statement of the method for reviewing public comments, and a statement of the changes, if any, that were made in response to these comments.

(7) To complete a preliminary waiver request: Official confirmation that the grantee wishes approval of the waiver request.

(8) To complete a preliminary waiver request: A statement of whether any public comments were received after preparation of the preliminary waiver request and, if so, copies and/or summaries of these comments (including transcripts and/or summaries of any comments made on the request at public meetings or hearings), and a statement of the changes, if any, that were made in response to these comments.

(9) To complete a preliminary waiver request: A statement of whether any

material/substantive changes of fact have occurred in information included in the preliminary waiver request since its submission, and, if so, a description of the change(s).

(10) To complete a preliminary waiver request: A description of any other changes to the preliminary request.

(d) *“Standard waiver.”* If the Department determines that a grantee has met the three criteria in paragraph (c)(2) of this section, has provided all information required by paragraph (c) of this section, has shown adequate concern for timely and meaningful public review and comment, and has proposed weatherization that meets all relevant requirements of title XXVI of Public Law 97–35 (42 U.S.C. 8621 *et seq.*) and 45 CFR part 96, the Department will approve a “standard” waiver.

(e) *“Good cause” waiver.*

(1) If a grantee does not meet one or more of the three criteria in paragraph (c)(2) of this section, then the grantee may submit documentation that demonstrates good cause why a waiver should be granted despite the grantee’s failure to meet this criterion or these criteria. “Good cause” waiver requests must include the following information, in addition to the information specified in paragraph (c) of this section:

(i) For each criterion under paragraph (c)(2) of this section that the grantee does not meet, an explanation of the specific reasons demonstrating good cause why the grantee does not meet the criterion and yet proposes to use additional funds for weatherization, citing measurable, quantified data, and stating the source(s) of the data used;

(ii) A statement of the grantee’s LIHEAP heating, cooling, and crisis assistance eligibility standards (eligibility criteria) and benefits levels for the fiscal year for which the waiver is requested and for the preceding fiscal year; and, if eligibility standards were less restrictive and/or benefit levels were higher in the preceding fiscal year for one or more of these program components, an explanation of the reasons demonstrating good cause why a waiver should be granted in spite of this fact;

(iii) A statement of the grantee’s opening and closing dates for applications for LIHEAP heating, cooling, and crisis assistance in the fiscal year for which the waiver is requested and in the preceding fiscal year, and a description of the grantee’s outreach efforts for heating, cooling, and crisis assistance in the fiscal year for which the waiver is requested and in the preceding fiscal year, and, if the grantee’s application period was longer

and/or outreach efforts were greater in the preceding fiscal year for one or more of these program components, an explanation of the reasons demonstrating good cause why a waiver should be granted in spite of this fact; and

(iv) If the grantee took, or will take, other actions that led, or will lead, to a reduction in the number of applications for LIHEAP heating, cooling, and/or crisis assistance, from the preceding fiscal year to the fiscal year for which the waiver is requested, a description of these actions and an explanation demonstrating good cause why a waiver should be granted in spite of these actions.

(2) If the Department determines that a grantee requesting a “good cause” waiver has demonstrated good cause why a waiver should be granted, has provided all information required by paragraphs (c) and (e)(1) of this section, has shown adequate concern for timely and meaningful public review and comment, and has proposed weatherization that meets all relevant requirements of title XXVI of Public Law 97–35 (42 U.S.C. 8621 *et seq.*) and 45 CFR part 96, the Department will approve a “good cause” waiver.

(f) *Approvals and disapprovals.* After receiving the grantee’s complete waiver request, the Department will respond in writing within 45-day, informing the grantee whether the request is approved on either a “standard” or “good cause” basis. The Department may request additional information and/or clarification from the grantee. If additional information and/or clarification is requested, the 45-day period for the Department’s response will start when the additional information and/or clarification is received. No waiver will be granted for a previous fiscal year.

(g) *Effective period.* Waivers will be effective from the date of the Department’s written approval until the funds for which the waiver is granted are obligated in accordance with title XXVI of Public Law 97–35 (42 U.S.C. 8621 *et seq.*) and 45 CFR part 96. Funds for which a weatherization waiver was granted that are carried over to the following fiscal year and used for weatherization shall not be considered “funds allotted” or “funds available” for the purposes of calculating the maximum amount that may be used for weatherization in the succeeding fiscal year.

5. Section 96.87 is revised as follows:

**§ 96.87 Leveraging incentive program.**

(a) *Scope and eligible grantees.*

(1) This section concerns the leveraging incentive program authorized by section 2607A of Public Law 97–35 (42 U.S.C. 8626(a)).

(2)(i) The only entities eligible to receive leveraging incentive funds from the Department are States (including the District of Columbia), Indian tribes, tribal organizations, and territories that received direct Federal LIHEAP funding under section 2602(b) of Public Law 97–35 (42 U.S.C. 8621(b)) in both the base period for which leveraged resources are reported, and the award period for which leveraging incentive funds are sought; and tribes and tribal organizations described in paragraphs (a)(2)(ii) and (a)(2)(iii) of this section.

(ii) Indian tribes that received LIHEAP services under section 2602(b) of Public Law 97–35 (42 U.S.C. 8621(b)) through a directly-funded tribal organization in the base period for which leveraged resources are reported, and receive direct Federal LIHEAP funding under section 2602(b) in the award period, will receive leveraging incentive funds allocable to them if they submit leveraging reports meeting all applicable requirements. If the tribal organization continues to receive direct funding under section 2602(b) in the award period, the tribal organization also will receive incentive funds allocable to it if it submits a leveraging report meeting all applicable requirements. In such cases, incentive funds will be allocated among the involved entities that submit leveraging reports, as agreed by these entities. If they cannot agree, HHS will allocate incentive funds based on the comparative role of each entity in obtaining and/or administering the leveraged resources, and/or their relative number of LIHEAP-eligible households.

(iii) If a tribe received direct Federal LIHEAP funding under section 2602(b) of Public Law 97–35 (42 U.S.C. 8621(b)) in the base period for which resources leveraged by the tribe are reported, and the tribe receives LIHEAP services under section 2602(b) through a directly-funded tribal organization in the award period, the tribal organization will receive leveraging incentive funds on behalf of the tribe for the resources if the tribal organization submits a leveraging report meeting all applicable requirements.

(b) *Definitions.*

(1) *Award period* means the fiscal year during which leveraging incentive funds are distributed to grantees by the Department, based on the countable leveraging activities they reported to the Department for the preceding fiscal year (the base period).

(2) *Base period* means the fiscal year for which a grantee's leveraging activities are reported to the Department; grantees' countable leveraging activities during the base period or base year are the basis for the distribution of leveraging incentive funds during the succeeding fiscal year (the award period or award year).

Leveraged resources are counted in the base period during which their benefits are provided to low-income households.

(3) *Countable loan fund* means revolving loan funds and similar loan instruments in which:

(i) The sources of both the loaned and the repaid funds meet the requirements of this section, including the prohibitions of paragraphs (f)(1), (f)(2), and (f)(3) of this section;

(ii) Neither the loaned nor the repaid funds are Federal funds or payments from low-income households, and the loans are not made to low-income households; and

(iii) The benefits provided by the loaned funds meet the requirements of this section for countable leveraged resources and benefits.

(4) *Countable petroleum violation escrow funds* means petroleum violation escrow (oil overcharge) funds that were distributed to a State or territory by the Department of Energy (DOE) after October 1, 1990, and interest earned in accordance with DOE policies on petroleum violation escrow funds that were distributed to a State or territory by DOE after October 1, 1990, that:

(i) Were used to assist low-income households to meet the costs of home energy through (that is, within and as a part of) a State or territory's LIHEAP program, another Federal program, or a non-Federal program, in accordance with a submission for use of these petroleum violation escrow funds that was approved by DOE;

(ii) Were not previously required to be allocated to low-income households; and

(iii) Meet the requirements of paragraph (d)(1) of this section, and of paragraph (d)(2)(ii) or (d)(2)(iii) of this section.

(5) *Home energy* means a source of heating or cooling in residential dwellings.

(6) *Low-income households* mean federally eligible (federally qualified) households meeting the standards for LIHEAP income eligibility and/or LIHEAP categorical eligibility as set by section 2605(b)(2) of Public Law 97-35 (42 U.S.C. 8624(b)(2)).

(7) *Weatherization* means low-cost residential weatherization and other energy-related home repair for low-

income households. Weatherization must be directly related to home energy.

(c) *LIHEAP funds used to identify, develop, and demonstrate leveraging programs.*

(1) Each fiscal year, States (excluding Indian tribes, tribal organizations, and territories) may spend up to the greater of \$35,000 or 0.08 percent of their net Federal LIHEAP allotments (funds payable) allocated under section 2602(b) of Public Law 97-35 (42 U.S.C. 8621(b)) specifically to identify, develop, and demonstrate leveraging programs under section 2607A(c)(2) of Public Law 97-35 (42 U.S.C. 8626a(c)(2)). Each fiscal year, Indian tribes, tribal organizations, and territories may spend up to the greater of two (2.0) percent of \$100 of their Federal LIHEAP allotments allocated under section 2602(b) of Public Law 97-35 (42 U.S.C. 8621(b)) specifically to identify, develop, and demonstrate leveraging programs under section 2607A(c)(2) of Public Law 97-35 (42 U.S.C. 8625a(c)(2)). For the purpose of this paragraph, Federal LIHEAP allotments include funds from regular and supplemental appropriations, with the exception of leveraging incentive funds provided under section 2602(d) of Public Law 97-35 (42 U.S.C. 8621(d)).

(2) LIHEAP funds used under section 2607A(c)(2) of Public Law 97-35 (42 U.S.C. 8626a(c)(2)) specifically to identify, develop, and demonstrate leveraging programs are not subject to the limitation in section 2605(b)(9) of Public Law 97-35 (42 U.S.C. 8624(b)(9)) on the maximum percent of Federal funds that may be used for costs of planning and administration.

(d) *Basic requirements for leveraged resources and benefits.*

(1) In order to be counted under the leveraging incentive program, leveraged resources and benefits must meet all of the following five criteria:

(i) They are from non-Federal sources.

(ii) They are provided to the grantee's low-income home energy assistance program, or to federally qualified low-income households as described in section 2605(b)(2) of Public Law 97-35 (42 U.S.C. 8624(b)(2)).

(iii) They are measurable and quantifiable in dollars.

(iv) They represent a net addition to the total home energy resources available to low-income households in excess of the amount of such resources that could be acquired by these households through the purchase of home energy, or the purchase of items that help these households meet the cost of home energy, at commonly available household rates or costs, or that could be obtained with regular LIHEAP allotments provided under section

2602(b) of Public Law 97-35 (42 U.S.C. 8621(b)).

(v) They meet the requirements for countable leveraged resources and benefits throughout this section and section 2607A of Public Law 97-35 (42 U.S.C. 8626a).

(2) Also, in order to be counted under the leveraging incentive program, leveraged resources and benefits must meet at least one of the following three criteria:

(i) The grantee's LIHEAP program had an active, substantive role in developing and/or acquiring the resource/benefits from home energy vendor(s) through negotiation, regulation, and/or competitive bid. The actions or efforts of one or more staff of the grantee's LIHEAP program—at the central and/or local level—and/or one or more staff of LIHEAP program subrecipient(s) acting in that capacity, were substantial and significant in obtaining the resource/benefits from the vendor(s).

(ii) The grantee appropriated or mandated the resource/benefits for distribution to low-income households through (that is, within and as a part of) its LIHEAP program. The resource/benefits are provided through the grantee's LIHEAP program to low-income households eligible under the grantee's LIHEAP standards, in accordance with the LIHEAP statute and regulations and consistent with the grantee's LIHEAP plan and program policies that were in effect during the base period, as if they were provided from the grantee's Federal LIHEAP allotment.

(iii) The grantee appropriated or mandated the resource/benefits for distribution to low-income households as described in its LIHEAP plan (referred to in section 2605(c)(1)(A) of Public Law 97-35) (42 U.S.C. 8624(c)(1)(A)). The resource/benefits are provided to low-income households as a supplement and/or alternative to the grantee's LIHEAP program, outside (that is, not through, within, or as a part of) the LIHEAP program. The resource/benefits are integrated and coordinated with the grantee's LIHEAP program. Before the end of the base period, the plan identifies and describes the resource/benefits, their source(s), and their integration/coordination with the LIHEAP program. The Department will determine resources/benefits to be integrated and coordinated with the LIHEAP program if they meet at least one of the following eight conditions. If a resource meets at least one of conditions A through F when the grantee's LIHEAP program is operating (and meets all other applicable requirements), the resource also is

countable when the LIHEAP program is not operating.

(A) For all households served by the resource, the assistance provided by the resource depends on and is determined by the assistance provided to these households by the grantee's LIHEAP program in the base period. The resource supplements LIHEAP assistance that was not sufficient to meet households' home energy needs, and the type and amount of assistance provided by the resource is directly affected by the LIHEAP assistance received by the households.

(B) Receipt of LIHEAP assistance in the base period is necessary to receive assistance from the resource. The resource serves only households that received LIHEAP assistance in the base period.

(C) Ineligibility for the grantee's LIHEAP program, or denial of LIHEAP assistance in the base period because of unavailability of LIHEAP funds, is necessary to receive assistance from the resource.

(D) For discounts and waivers: eligibility for and/or receipt of assistance under the grantee's LIHEAP program in the base period, and/or eligibility under the Federal standards set by section 2605(b)(2) of Public Law 97-35 (42 U.S.C. 8624(b)(2)), is necessary to receive the discount or waiver.

(E) During the period when the grantee's LIHEAP program is operating, staff of the grantee's LIHEAP program and/or staff assigned to the LIHEAP program by a local LIHEAP administering agency or agencies, and staff assigned to the resource communicate orally and/or in writing about how to meet the home energy needs of specific, individual households. For the duration of the LIHEAP program, this communication takes place before assistance is provided to each household to be served by the resource, unless the applicant for assistance from the resource presents documentation of LIHEAP eligibility and/or the amount of LIHEAP assistance received or to be received.

(F) A written agreement between the grantee's LIHEAP program or local LIHEAP administering agency, and the agency administering the resource, specifies the following about the resource: eligibility criteria; benefit levels; period of operation; how the LIHEAP program and the resource are integrated/coordinated; and relationship between LIHEAP eligibility and/or benefit levels, and eligibility and/or benefit levels for the resource. The agreement provides for annual or more frequent reports to be provided to the

LIHEAP program by the agency administering the resource.

(G) The resource accepts referrals from the grantee's LIHEAP program, and as long as the resource has benefits available, it provides assistance to all households that are referred by the LIHEAP program and that meet the resource's eligibility requirements. Under this condition, only the benefits provided to households referred by the LIHEAP program are countable.

(H) Before the grantee's LIHEAP heating, cooling, crisis, and/or weatherization assistance component(s) open and/or after the grantee's LIHEAP heating, cooling, crisis, and/or weatherization assistance component(s) close for the season or for the fiscal year, or before the entire LIHEAP program/opens and/or after the entire LIHEAP program closes for the season or for the fiscal year, the resource is made available specifically to fill the gap caused by the absence of the LIHEAP component(s) or program. The resource is not available while the LIHEAP component(s) or program is operating.

(e) *Countable leveraged resources and benefits.* Resources and benefits that are countable under the leveraging incentive program include but are not limited to the following, provided that they also meet all other applicable requirements:

(1) Cash resources: State, tribal, territorial, and other public and private non-Federal funds, including countable loan funds and countable petroleum violation escrow funds as defined in paragraphs (b)(3) and (b)(4) of this section, that are used for:

(i) Heating, cooling, and energy crisis assistance payments and cash benefits made in the base period to or on behalf of low-income households toward their home energy costs (including home energy bills, taxes on home energy sales/purchases and services, connection and reconnection fees, application fees, late payment charges, bulk fuel tank rental or purchase costs, and security deposits that are retained for six months or longer);

(ii) Purchase of fuels that are provided to low-income households in the base period for home energy (such as fuel oil, liquefied petroleum gas, and wood);

(iii) Purchase of weatherization materials that are installed in recipients' homes in the base period;

(iv) Purchase of the following tangible items that are provided to low-income households and/or installed in recipients' homes in the base period: blankets, space heating devices, equipment, and systems; space cooling devices, equipment, and systems; and other tangible items that help low-

income households meet the costs of home energy and are specifically approved by the Department as countable leveraged resources;

(v) Installation, replacement, and repair of the following in the base period: weatherization materials; space heating devices, equipment, and systems; space cooling devices, equipment, and systems; and other tangible items that help low-income households meet the costs of home energy and are specifically approved by the Department;

(vi) The following services, when they are an integral part of weatherization to help low-income households meet the costs of home energy in the base period: installation, replacement, and repair of windows, exterior doors, roofs, exterior walls, and exterior floors; pre-weatherization home energy audits of homes that are weatherized as a result of these audits; and post-weatherization inspection of homes; and

(vii) The following services, when they are provided (carried out) in the base period: installation, replacement, and repair of smoke fire alarms that are an integral part, and necessary for safe operation, of a home heating or cooling system installed or repaired as a weatherization activity; and asbestos removal and that is an integral part of, and necessary to carry out, weatherization to help low-income households meet the cost of home energy.

(2) Home energy discounts to waivers that are provided in the base period to low-income households and pertain to generally applicable prices, rates, fees, charges, costs and/or requirements, in the amount of the discount, reduction, waiver, or forgiveness, or that apply to certain tangible fuel and non-fuel items and to certain services, that are provided in the base period to low-income households and help these households meet the costs of home energy, in the amount of the discount or reduction.

(i) Discounts or reductions in utility and bulk fuel prices, rates, or bills;

(ii) Partial or full forgiveness of home energy bill arrearages;

(iii) Partial or full waivers of utility and other home energy connection and reconnection fees, application fees, late payment charges, bulk fuel tank rental or purchase costs, and home energy security deposits that are retained for six months or longer;

(iv) Reductions in and partial or full waivers of non-Federal taxes on home energy sales/purchases and services, and reductions in and partial or full waivers of other non-Federal taxes provided as tax "credits" to low-income

households to offset their home energy costs, except when Federal funds or Federal tax "credits" provide payment or reimbursement for these reductions/waivers;

(v) Discounts or reductions in the cost of the following tangible items that are provided to low-income households and/or installed in recipients' homes: weatherization materials; blankets; space heating devices, equipment, and systems; space cooling devices, equipment, and systems; and other tangible items that are specifically approved by the Department;

(vi) Discounts or reductions in the cost of installation, replacement, and repair of the following: weatherization materials; space heating devices, equipment, and systems; space cooling devices, equipment, and systems; and other tangible items that help low-income households meet the costs of home energy and are specifically approved by the Department;

(vii) Discounts or reductions in the cost of the following services, when the services are an integral part of weatherization to help low-income households meet the costs of home energy: installation, replacement, and repair of windows, exterior doors, roofs, exterior walls, and exterior floors; pre-weatherization home energy audits of homes that were weatherized as a result of these audits; and post-weatherization inspection of homes; and

(viii) Discounts or reductions in the cost of installation, replacement, and repair of smoke/fire alarms that are an integral part, and necessary for safe operation, of a home heating or cooling system installed or repaired as a weatherization activity; and discounts or reductions in the cost of asbestos removal that is an integral part of, and necessary to carry out, weatherization to help low-income households meet the costs of home energy.

(3) Certain third-party in-kind contributions that are provided in the base period to low-income households:

(i) Donated fuels used by recipient households for home energy (such as fuel oil, liquefied petroleum gas, and wood);

(ii) Donated weatherization materials that are installed in recipients' homes;

(iii) Donated blankets; donated space heating devices, equipment, and systems; donated space cooling devices, equipment, and systems; and other donated tangible items that help low-income households meet the costs of home energy and are specifically approved by the Department as countable leveraged resources;

(iv) Unpaid volunteers' services specifically to install, replace, and

repair the following: weatherization materials; space heating devices, equipment, and systems; space cooling devices, equipment, and systems; and other items that help low-income households meet the costs of home energy and are specifically approved by the Department;

(v) Unpaid volunteers' services specifically to provide (carry out) the following, when these services are an integral part of weatherization to help low-income households meet the costs of home energy: installation, replacement, and repair of windows, exterior doors, roofs, exterior walls, and exterior floors; pre-weatherization home energy audits of homes that were weatherized as a result of these audits; and post-weatherization inspection of homes;

(vi) Unpaid volunteers' services specifically to: install, replace, and repair smoke/fire alarms as an integral part, and necessary for safe operation, of a home heating or cooling system installed or repaired as a weatherization activity; and remove asbestos as an integral part of, and necessary to carry out, weatherization to help low-income households meet the costs of home energy;

(vii) Paid staff's services that are donated by the employer specifically to install, replace, and repair the following: weatherization materials; space heating devices, equipment, and systems; space cooling devices, equipment, and systems; and other items that help low-income households meet the costs of home energy and are specifically approved by the Department;

(viii) Paid staff's services that are donated by the employer specifically to provide (carry out) the following, when these services are an integral part of weatherization to help low-income households meet the costs of home energy: installation, replacement, and repair of windows, exterior doors, roofs, exterior walls, and exterior floors; pre-weatherization home energy audits of homes that were weatherized as a result of these audits; and post-weatherization inspection of homes; and

(ix) Paid staff's services that are donated by the employer specifically to: install, replace, and repair smoke/fire alarms as an integral part, and necessary for safe operation, of a home heating or cooling system installed or repaired as a weatherization activity; and remove asbestos as an integral part of, and necessary to carry out, weatherization to help low-income households meet the costs of home energy.

(f) *Resources and benefits that cannot be counted.* The following resources and

benefits are not countable under the leveraging incentive program:

(1) Resources (or portions of resources) obtained, arranged, provided, contributed, and/or paid for, by a low-income household for its own benefit, or which a low-income household is responsible for obtaining or required to provide for its own benefit or for the benefit of others, in order to receive a benefit of some type;

(2) Resources (or portions of resources) provided, contributed, and/or paid for by building owners, building managers, and/or home energy vendors, if the cost of rent, home energy, or other charge(s) to the recipient were or will be imposed, as a result;

(3) Resources (or portions of resources) directly provided, contributed, and/or paid for by member(s) of the recipient household's family (parents, grandparents, great-grandparents, sons, daughters, grandchildren, great-grandchildren, brothers, sisters, aunts, uncles, first cousins, nieces, and nephews, and their spouses), regardless of whether the family member(s) lived within the household, unless the family member(s) also provided the same resource to other low-income households during the base period and did not limit the resource to members of their own family;

(4) Deferred home energy obligations;

(5) Projected future savings from weatherization;

(6) Delivery, and discounts in the cost of delivery, of fuel, weatherization materials, and all other items;

(7) Purchase, rental, donation, and loan, and discounts in the cost of purchase and rental, of: supplies and equipment used to deliver fuel, weatherization materials, and all other items; and supplies and equipment used to install and repair weatherization materials and all other items;

(8) Petroleum violation escrow (oil overcharge) funds that do not meet the definition in paragraph (b)(4) of this section;

(9) Interest earned/paid on petroleum violation escrow funds that were distributed to a State or territory by the Department of Energy on or before October 1, 1990;

(10) Interest earned/paid on Federal funds;

(11) Interest earned/paid on customers' security deposits, utility deposits, etc., except when forfeited by the customer and used to provide countable benefits;

(12) Borrowed funds that do not meet the requirements in paragraph (b)(3) above (including loans made by and/or to low-income households), interest

paid on borrowed funds, and reductions in interest paid on borrowed funds;

(13) Resources (or portions of resources) for which Federal payment or reimbursement has been or will be provided/received;

(14) Tax deductions and tax credits received from any unit(s) of government by donors/contributors of resources for these donations, and by vendors for providing rate reductions, discounts, waivers, credits, and/or arrearage forgiveness to or for low-income households, etc.;

(15) Funds and other resources that have been or will be used as matching or cost sharing for any Federal program;

(16) Leveraged resources counted under any other Federal leveraging incentive program;

(17) Costs of planning and administration, space costs, and intake costs;

(18) Outreach activities, budget counseling, case management, and energy conservation education;

(19) Training;

(20) Installation, replacement, and repair of lighting fixtures and light bulbs;

(21) Installation, replacement, and repair of smoke/fire alarms that are not an integral part, and necessary for safe operation, of a home heating or cooling system installed or repaired as a weatherization activity;

(22) Asbestos removal that is not an integral part of, and necessary to carry out, weatherization to help low-income households meet the costs of home energy;

(23) Paid services where payment is not made from countable leveraged resources, unless these services are donated as a countable in-kind contribution by the employer;

(24) All in-kind contributions except those described in paragraph (e)(3) of this section; and

(25) All other resources that do not meet the requirements of this section and of section 2607A of Public Law 97-35 (42 U.S.C. 8626a).

(g) *Valuation and documentation of leveraged resources and offsetting costs.*

(1) Leveraged cash resources will be valued at the fair market value of the benefits they provided to low-income households, as follows. Payments to or on behalf of low-income households for heating, cooling, and energy crisis assistance will be valued at their actual amount or value at the time they were provided. Purchased fuel, weatherization materials, and other countable tangible items will be valued at their fair market value (the commonly available household rate or cost in the local market area) at the time they were

purchased. Installation, replacement, and repair of weatherization materials, and other countable services, will be valued at rates consistent with those ordinarily paid for similar work, by persons of similar skill in this work, in the grantee's or subrecipient's organization in the local area, at the time these services were provided. If the grantee or subrecipient does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work, by persons of similar skill in this work, in the same labor market, at the time these services were provided. Fringe benefits and overhead costs will not be counted.

(2) Home energy discounts, waivers, and credits will be valued at their actual amount or value.

(3) Donated fuel, donated weatherization materials, and other countable donated tangible items will be valued at their fair market value (the commonly available household cost in the local market area) at the time of donation.

(4) Donated unpaid services, and donated third-party paid services that are not in the employee's normal line of work, will be valued at rates consistent with those ordinarily paid for similar work, by persons of similar skill in this work, in the grantee's or subrecipient's organization in the local area, at the time these services were provided. If the grantee or subrecipient does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work, by persons of similar skill in this work, in the same labor market, at the time these services were provided. Fringe benefits and overhead costs will not be counted. Donated third-party paid services of employees in their normal line of work will be valued at the employee's regular rate of pay, excluding fringe benefits and overhead costs.

(5) Offsetting costs and charges will be valued at their actual amount or value.

(i) Funds from grantees' regular LIHEAP allotments that are used specifically to identify, develop, and demonstrate leveraging programs under section 2607A(c)(2) of Public Law 97-35 (42 U.S.C. 8626a(c)(2)) will be deducted as offsetting costs in the base period in which these funds are obligated, whether or not there are any resulting leveraged benefits. Costs incurred from grantees' own funds to identify, develop, and demonstrate leveraging programs will be deducted in the first base period in which resulting leveraged benefits are provided to low-income

households. If there is no resulting leveraged benefit from the expenditure of the grantee's own funds, the grantee's expenditure will not be counted or deducted.

(ii) Any costs assessed or charged to low-income households on a continuing or on-going basis, year after year, specifically to participate in a counted leveraging program or to receive counted leveraged resources/benefits will be deducted in the base period these costs are paid. Any one-time costs or charges to low-income households specifically to participate in a counted leveraging program or to receive counted leveraged resources/benefits will be deducted in the first base period the leveraging program or resource is counted. Such costs or charges will be subtracted from the gross value of a counted resource or benefit for low-income households whose benefits are counted, but not for any households whose benefits are not counted.

(6) Only the amount of the net addition to recipient low-income households' home energy resources may be counted in the valuation of a leveraged resource.

(7) Leveraged resources and benefits, and offsetting costs and charges, will be valued according to the best data available to the grantee.

(8) Grantees must maintain, or have readily available, records sufficient to document leveraged resources and benefits, and offsetting costs and charges, and their valuation. These records must be retained for three years after the end of the base period whose leveraged resources and benefits they document.

(h) *Leveraging report.*

(1) In order to qualify for leveraging incentive funds, each grantee desiring such funds must submit to the Department a report on the leveraged resources provided to low-income households during the proceedings base period. These reports must contain the following information in a format established by the Department.

(i) For each separate leveraged resource, the report must:

(A) Briefly describe the specific leveraged resource and the specific benefit(s) provided to low-income households by this resource, and state the source of the resource;

(B) State whether the resource was acquired in cash, as a discount/waiver, or as an in-kind contribution;

(C) Indicate the geographical area in which the benefit(s) were provided to recipients;

(D) State the month(s) and year(s) when the benefit(s) were provided to recipients;

(E) State the gross dollar value of the countable benefits provided by the resource as determined in accordance with paragraph (g) of this section, indicate the source(s) of the data used, and describe how the grantee quantified the value and calculated the total amount;

(F) State the number of low-income households to whom the benefit(s) were provided, and state the eligibility standard(s) for the low-income households to whom the benefit(s) were provided;

(G) Indicate the agency or agencies that administered the resource/benefit(s); and

(H) Indicate the criterion or criteria for leveraged resources in paragraph (d)(2) of this section that the resource/benefits meet, and for criteria in paragraphs (d)(2)(i) and (d)(2)(iii) of this section, explain how resources/benefits valued at \$5,000 or more meet the criterion or criteria.

(ii) State the total gross dollar value of the countable leveraged resources and benefits provided to low-income households during the base period (the sum of the amounts listed pursuant to paragraph (h)(1)(i)(E) of this section).

(iii) State in dollars any costs incurred by the grantee to leverage resources, and any costs and charges imposed on low-income households to participate in a counted leveraging program or to receive counted leveraged benefits, as determined in accordance with paragraph (g)(5) of this section. Also state the amount of the grantee's regular LIHEAP allotment that the grantee used during the base period specifically to identify, develop, and demonstrate leveraging programs under section 2607A(c)(2) of Public Law 97-35 (42 U.S.C. 8626a(c)(2)).

(iv) State the net dollar value of the countable leveraged resources and benefits for the base period. (Subtract the amounts in paragraph (h)(1)(iii) of this section from the amount in paragraph (h)(1)(ii) of this section.)

(2) Leveraging reports must be postmarked or hand-delivered not later than November 30 of the fiscal year for which leveraging incentive funds are requested.

(3) The Department may require submission of additional documentation and/or clarification as it determines

necessary to verify information in a grantee's leveraging report, to determine whether a leveraged resource is countable, and/or to determine the net valuation of a resource. In such cases, the Department will set a date by which it must receive information sufficient to document countability and/or valuation. In such cases, if the Department does not receive information that it considers sufficient to document countability and/or valuation by the date it has set, then the Department will not count the resource (or portion of resource) in question.

(i) *Determination of grantee shares of leveraging incentive funds.* Allocation of leveraging incentive funds to grantees will be computed according to a formula using the following factors and weights:

(1) Fifty (50) percent based on the final net value of countable leveraged resources provided to low-income households during the base period by a grantee relative to its net Federal allotment of funds allocated under section 2602(b) of Public Law 97-35 (42 U.S.C. 8621(b)) during the base period, as a proportion of the final net value of the countable leveraged resources provided by all grantees during the base period relative to their net Federal allotment of funds allocated under that section during the base period; and

(2) Fifty (50) percent based on the final net value of countable leveraged resources provided to low-income households during the base period by a grantee as a proportion of the total final net value of the countable leveraged resources provided by all grantees during the base period; except that: No grantee may receive more than twelve (12.0) percent of the total amount of leveraging incentive funds available for distribution to grantees in any award period; and no grantee may receive more than the smaller of its net Federal allotment of funds allocated under section 2602(b) of Public Law 97-35 (42 U.S.C. 8621(b)) during the base period, or two times (double) the final net value of its countable leveraged resources for the base period. The calculations will be based on data contained in the leveraging reports submitted by grantees under paragraph (h) of this section as approved by the Department, and allocation data developed by the Department.

(j) *Uses of leveraging incentive funds.*

(1) Funds awarded to grantees under the leveraging incentive program must be used to increase or maintain heating, cooling, energy crisis, and/or weatherization benefits through (that is, within and as a part of) the grantee's LIHEAP program. These funds can be used for weatherization without regard to the weatherization maximum in section 2605(k) of Public Law 97-35 (42 U.S.C. 8624(k)). However, they cannot be counted in the base for calculation of the weatherization maximum for regular LIHEAP funds authorized under section 2602(b) of Public Law 97-35 (42 U.S.C. 8621(b)). Leveraging incentive funds cannot be used for costs of planning and administration. However, in either the award period or the fiscal year following the award period, they can be counted in the base for calculation of maximum grantee planning and administrative costs under section 2605(b)(9) of Public Law 97-35 (42 U.S.C. 8624(b)(9)). They cannot be counted in the base for calculation of maximum carryover of regular LIHEAP funds authorized under section 2602(b) of Public Law 97-35 (42 U.S.C. 8621(b)).

(2) Grantees must include the uses of leveraging incentive funds in their LIHEAP plans (referred to in section 2605(c)(1)(A) of Public Law 97-35) (42 U.S.C. 8624(c)(1)(A)) for the fiscal year in which the grantee obligates these funds. Grantees must document uses of leveraging incentive funds in the same way they document uses of regular LIHEAP funds authorized under section 2602(b) of Public Law 97-35 (42 U.S.C. 8621(b)). Leveraging incentive funds are subject to the same audit requirements as regular LIHEAP funds.

(k) *Period of obligation for leveraging incentive funds.* Leveraging incentive funds are available for obligation during both the award period and the fiscal year following the award period, without regard to limitations on carryover of funds in section 2607(b)(2)(B) of Public Law 97-35 (42 U.S.C. 8626(b)(2)(B)). Any leveraging incentive funds not obligated for allowable purposes by the end of this period must be returned to the Department.

[FR Doc. 95-9915 Filed 4-28-95; 8:45 am]

BILLING CODE 4110-60-M